No. 06-21

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MAYRA FERNANDEZ, also known as Frank Morena, also known as La Jefa,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LANCE CROFFOOT-SUEDE
(*Counsel of Record*)
Appointed Under the Criminal Justice Act of 1964
JOSEPH MACK
VICTORIA ORLOWSKI
LENORE F. HORTON
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

Attorneys for Petitioner

Questions Presented

1. Does the mandate in 18 U.S.C. § 3553(a)(6) instructing sentencing judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" apply to defendants convicted of participating in the same criminal conspiracy?

2. Did the Second Circuit wrongly interpret 18 U.S.C. § 3553(a)(6) when it held that two defendants, with the same criminal history and found guilty of participating in the same conspiracy, did not have "similar records" and were not found guilty of "similar conduct" because one defendant qualified for offense level reductions for acceptance of responsibility and safety-valve treatment, and the other did not?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
PRAYER	1
OPINION BELOW.	1
STATEMENT OF JURISDICTION	1
RELEVANT STATUTORY PROVISION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. The Circuits Are Split and Require Guidance Regarding Whether 18 U.S.C. § 3553(a)(6) Permits Sentencing Judges to Consider Disparities Among the Sentences Imposed Upon Defendants Convicted of Participating in the Same Criminal Conspiracy	6
II. The Holdings of Several Circuits, Including the Second Circuit, Regarding Whether Defendants Have "Similar Records" or Were Convicted of "Similar Conduct" Within the Meaning of 18 U.S.C. § 3553(a)(6), Conflict with this Court's Basic Principles of Statutory Interpretation	11
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: PAGE

Hartford Underwriters Ins. Co. v. *Union Planters Bank, N.A.*, 530 U.S. 1 (2000) 12

Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999) 12

Iselin v. *United States*, 270 U.S. 245 (1926) 13

Lamie v. *U.S. Trustee*, 540 U.S. 526 (2004) 13

United States v. *Blackwell*, 127 F.3d 947 (10th Cir. 1997) 7

United States v. *Bonner*, 313 F.3d 110 (2d Cir. 2002) 10

United States v. *Booker*, 543 U.S. 220 (2005) 6, 7, 8, 9, 10

United States v. *Boscarino*, 437 F.3d 634 (7th Cir. 2006).....10, 11, 12

United States v. *Caperna*, 251 F.3d 827 (9th Cir. 2001) 7, 8, 13

United States v. *Chavez-Diaz*, 444 F.3d 1223 (10th Cir. 2006) 6

United States v. *Daas*, 198 F.3d 1167 (9th Cir. 1999)..... 8

United States v. *Fernandez*, 443 F.3d 19 (2d Cir. 2006) 1, 4, 5, 9, 11

PAGE

United States v. *Flores-Seda*, 423 F.3d 17 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 1160 (2006) 11, 12

United States v. *Florez*, 447 F.3d 145 (2d Cir. 2006) 9

United States v. *Gallegos*, 129 F.3d 1140 (10th Cir. 1997) 7

United States v. *Joyner*, 924 F.2d 454 (2d Cir. 1991) 10

United States v. *McGee*, 408 F.3d 966 (7th Cir. 2005) 8, 9, 14

United States v. *Morales*, 445 F.3d 1081 (8th Cir. 2006) 10, 13, 14

United States v. *Nelson*, 918 F.2d 1268 (6th Cir. 1990) 8

United States v. *Newby*, 11 F.3d 1143 (3d Cir. 1993) 8

United States v. *Ortiz-Zayas*, No. 02-CR-0837, 2005 WL 1430489 (S.D.N.Y. June 17, 2005) 14, 15

United States v. *Saez*, 444 F.3d 15 (1st Cir. 2006) 9, 10

United States v. *Schneiderhan*, 404 F.3d 73 (1st Cir.), *cert. denied*, 126 S. Ct. 381 (2005) 11, 12

United States v. *Vaughn*, 433 F.3d 917 (7th Cir. 2006) 7

PAGE

United States v. *Walls*, 293 F.3d 959 (6th Cir. 2002) 8

United States v. *White*, 406 F.3d 827 (7th Cir. 2005) 7

Statutes:

18 U.S.C. § 3553(a)(6) ..... *passim*

21 U.S.C. § 841(a)(1) 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 3231 1

Other Authorities:

U.S. Sentencing Comm'n, 2002 Annual Report 13

USSG § 3E1.1 5

USSG § 5C1.2 5

USSG § 5K1.1 ..... 5, 12

Prayer

Mayra Fernandez respectfully petitions this Court for a writ of certiorari to review the judgment and order of the Court of Appeals for the Second Circuit in this case.

Opinion Below

The Second Circuit's opinion affirming Ms. Fernandez's sentence principally of 151 months imprisonment is reported as *United States* v. *Fernandez*, 443 F.3d 19 (2d Cir. 2006), and is in the attached Appendix. Pet. App. 1a-30a. The District Court of the Southern District of New York did not publish an opinion in connection with its sentencing decision; however, a copy of the sentencing transcript is in the attached Appendix. *Id.* 31a-51a.

Statement of Jurisdiction

The Court of Appeals for the Second Circuit entered its judgment on April 3, 2006. This petition is filed within 90 days of that date. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals for the Second Circuit had jurisdiction over petitioner's appeal of her sentence pursuant to 28 U.S.C. § 1291. The District Court of the Southern District of New York had jurisdiction over petitioner's trial pursuant to 28 U.S.C. § 3231.

Relevant Statutory Provision

Section 3553(a)(6) of Title 18, United States Code, provides:

> The court, in determining the particular sentence to be imposed, shall consider—
>
> . . .
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.]

Statement of the Case

On March 7, 2003, Mayra Fernandez ("Mayra" or "Ms. Fernandez") was convicted by a jury on a 1-count indictment charging her with a 9-month conspiracy to distribute, and possession with the intent to distribute, one kilogram and more of heroin in violation of 21 U.S.C. § 841(a)(1). Pet. App. 3a-4a. On March 17, 2005, Mayra was sentenced to a prison term of 151 months, to be followed by five years of supervised release. *Id.* 4a.

Shortly before Mayra's trial, her co-conspirator and father, Elias Fernandez, pleaded guilty to an information charging him with two counts of engaging in a 4 1/2-year conspiracy to distribute 5 kilograms and more of cocaine, and 1 kilogram and more of heroin in violation of 21 U.S.C. § 841(a)(1). Pet. App. 163a (Second Circuit Br. for Def.-Appellant (without exhibits), attached hereto at Pet. App. 153a-183a). For his crimes, Elias

Fernandez received a sentence of only 135 months imprisonment.[1] Pet. App. 4a.

The course of events culminating in the arrest of Mayra and her father in 2002 establish that Elias Fernandez was the mastermind of a drug-smuggling conspiracy that pre-dated his daughter's involvement. Elias Fernandez deserted his family during Mayra's early childhood, moved to the United States, and started a "successful" narcotics distribution network. Pet. App. 141a-143a, 162a. Years later, Mayra immigrated to the United States as a teenager, having no prior criminal history and having had no contact with her father since her early childhood. Shortly after she moved to New York, Mayra was reunited with her father. *Id.* 129a-130a, 141a-143a. The PSR prepared in anticipation of Mayra's sentencing explains that Elias Fernandez recruited Mayra into his drug-smuggling business, introduced her to other drug-traffickers, taught her how to sell and package drugs, and offered to help his otherwise-homeless daughter pay for an apartment. *Id.* 99a-100a, 141a-143a.

Elias Fernandez's drug-smuggling business was eventually infiltrated by an agent for the Drug Enforcement Agency ("DEA"). Pet. App. 4a-5a. This agent met with Elias Fernandez nearly every day for two months. *Id.* 5a. During this same period of time, the DEA agent met with Mayra on only four occasions. *Id.* As borne out by the DEA agent's testimony at Mayra's trial, Mayra's PSR, and Elias Fernandez's plea allocution, Elias Fernandez was convicted of more serious conduct than

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[1] The Presentence Investigation Report ("PSR") prepared by the U.S. Probation Department for Mayra, attached hereto at Pet. App. 115a-146a, illustrates that Elias Fernandez's actual offense conduct and drug quantity extended far beyond, and was far greater than, what was accounted for in his guilty plea and sentencing calculation. Pet. App. 17a, 111a-112a.

Mayra, a point that neither the government, the district court, nor the Second Circuit has disputed. Furthermore, as Judge Baer pointed out during Elias Fernandez's sentencing, his information was not necessary to convict Mayra. Pet. App. 150a ("I suppose, that even though you might implicate your daughter that the government was well aware of all of that before you did so . . . .") (Transcript of the Sentencing Hearing for Elias Fernandez, attached hereto at Appendix 147a-152a). At sentencing, Elias was granted safety-valve treatment and received a three-point reduction in his offense level for accepting responsibility for his crimes. *Id.* 24a.

Ms. Fernandez argued before the district court and the Second Circuit that Elias Fernandez's acceptance of responsibility and qualification for safety-valve treatment did not warrant the disparity in their sentences, given his more serious conduct. The Second Circuit made two important—and the petitioner respectfully submits, erroneous—pronouncements in addressing Ms. Fernandez's arguments below regarding the apparent and unwarranted sentencing disparity between Ms. Fernandez and Elias Fernandez.

First, the Second Circuit stated:

> "[E]ven assuming *arguendo* that 18 U.S.C. § 3553(a)(6) can support a reduced sentence designed to eliminate or diminish disparity between the sentences imposed on co-defendants, those co-defendants would have to be similarly situated because the provision mandates that sentencing judges take into account "*unwarranted* sentence disparities among defendants with *similar* records who have been found guilty of *similar* conduct." 18 U.S.C. § 3553(a)(6) (emphasis added).

Pet. App. 23a-24a (footnote references omitted). As demonstrated *infra*, 18 U.S.C. § 3553(a)(6) can support a reduced sentence on the basis of co-defendant and co-conspirator sentencing disparity. The Second Circuit, however, only assumed, without deciding, that § 3553(a)(6) applied to similarly situated co-defendants and co-conspirators. On that basis, the Second Circuit considered whether Elias Fernandez and Mayra were similarly situated.

Second, the Second Circuit held that Elias Fernandez and Mayra were not similarly situated because Elias Fernandez, unlike his daughter Mayra, qualified for a two-level reduction under the safety-valve provision of the United States Sentencing Guidelines ("USSG" or "Guidelines") and a three-level reduction for acceptance of responsibility under the Guidelines.[2] Pet. App. 24a. As specified before the district court and the Second Circuit, Ms. Fernandez has never sought—and does not now seek—safety-valve treatment or a substantial assistance motion pursuant to USSG § 5K1.1. Pet. App. 9a, 45a. Rather, Ms. Fernandez argues that neither acceptance of responsibility under USSG § 3E1.1 nor qualifying for safety-valve treatment under USSG § 5C1.2 defines "similar conduct" or "similar records" under 18 U.S.C. § 3553(a)(6).

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[2] As a result of Elias Fernandez's safety-valve proffer, however, he pleaded guilty to a greater drug weight than was charged in his indictment; this raised his base offense level by two levels and thereby eliminated the benefit he received from the two-level reduction for safety-valve treatment. Pet. App. 148a.

Reasons for Granting the Writ

I. The Circuits Are Split and Require Guidance Regarding Whether 18 U.S.C. § 3553(a)(6) Permits Sentencing Judges to Consider Disparities Among the Sentences Imposed Upon Defendants Convicted of Participating in the Same Criminal Conspiracy

Even prior to this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), decisions by various courts of appeals have produced conflicting results in cases where a defendant sought a reduced sentence pursuant to 18 U.S.C. § 3553(a)(6), based upon the sentence of another defendant convicted of participating in the same crime or conspiracy. As outlined below, a three-way split among the circuits exists, whereby certain circuits explicitly hold that § 3553(a)(6) has no application to co-defendants and co-conspirators, others explicitly hold that it does apply, and a third contingent has deferred decision on the issue. This Court should resolve the current circuit split, and provide much-needed guidance on the issue of sentencing disparities between co-defendants and co-conspirators—a recurring issue in criminal sentencing that has not been examined by this Court.[3]

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[3] This petition does not seek to address those rare instances in which a district court examined the sentences of two defendants involved in "similar" but unrelated criminal activity. *See, e.g.*, *United States* v. *Chavez-Diaz*, 444 F.3d 1223, 1230 (10th Cir. 2006) (affirming a sentence that was based, in part, on the district court's decision to reduce Chavez-Diaz's sentence "to make it consistent" with a sentence the district court imposed earlier that day on an unrelated defendant convicted of the same offense) (internal quotations omitted).

Both the Seventh[4] and Tenth Circuits have explicitly held that § 3553(a)(6) does not apply to co-defendants and co-conspirators, either because the Guidelines is the chosen instrument for eliminating sentencing disparities, or because § 3553(a)(6) is concerned solely with nationwide disparities. For instance, the Seventh Circuit has reaffirmed after *Booker* its long-held belief that co-defendant and co-conspirator disparity, when examined either under § 3553(a)(6) or the Equal Protection Clause, is not a valid claim of error where the sentence falls within a correctly calculated Guidelines range. *See, e.g.*, *United States* v. *Vaughn*, 433 F.3d 917, 926 n.14 (7th Cir. 2006) (quoting *United States* v. *White*, 406 F.3d 827, 837 (7th Cir. 2005)). In *United States* v. *Gallegos*, the Tenth Circuit held that "the purpose of the guidelines is to eliminate unwarranted disparities in sentencing nationwide, not to eliminate disparity between co-defendants." 129 F.3d 1140, 1143 (10th Cir. 1997) (citation, quotation marks and brackets omitted); *see also United States* v. *Blackwell*, 127 F.3d 947, 951-52 (10th Cir. 1997) (finding that a defendant alleging a disparity with the sentence of a co-conspirator is not entitled to relief if his sentence is within a properly calculated Guidelines range).

Conversely, the Ninth and Sixth Circuits have explicitly held that co-defendant and co-conspirator sentencing disparity is properly considered under § 3553(a)(6). The Ninth Circuit has long held that sentencing judges are not bound by the Guidelines range when equalizing sentences among co-defendants and co-conspirators so long as those defendants were convicted of the same offense. *United States* v. *Caperna*, 251 F.3d 827, 831-32

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[4] As is explained *infra* pp. 8-9, the Seventh Circuit has carved out an exception for when co-defendant and co-conspirator disparity may be considered.

(9th Cir. 2001); *United States* v. *Daas*, 198 F.3d 1167, 1180-81 (9th Cir. 1999); *accord United States* v. *Nelson*, 918 F.2d 1268, 1273 (6th Cir. 1990) (noting that courts may depart from the Guidelines "to generally conform one conspirator's sentence to the sentences imposed on his co-conspirators"). In *United States* v. *Walls*, the Sixth Circuit—even before *Booker*—reaffirmed its view that sentencing judges have the ability to impose a sentence outside a Guidelines range based upon co-defendant disparity. 293 F.3d 959, 969-70 (6th Cir. 2002).

The Third and Seventh Circuits have held that co-defendant and co-conspirator disparity may be considered in certain situations. For example, long before the Guidelines became advisory, the Third Circuit held that the sentences of co-defendants could be considered when selecting a sentence ***within*** the applicable Guidelines range. *See United States* v. *Newby*, 11 F.3d 1143, 1149-50 (3d Cir. 1993). And the Seventh Circuit recently recognized an exception to its rulings that § 3553(a)(6) only applies to nationwide disparities, and not to sentences within properly calculated Guidelines ranges. In *United States* v. *McGee*, the Seventh Circuit vacated a sentence upon the defendant's "credible argument" concerning co-conspirator disparity because the facts suggested that the differing sentences among the co-conspirators "undercut[ ] the guidelines' goal of uniformity in sentencing." 408 F.3d 966, 987-88 (7th Cir. 2005). There, the court recognized that the facts before it were unique "in the sense that the principal conspirators cooperated with the government and testified against their underlings, a reverse of the more typical situation where the subordinates turn on the principals." *Id.* at 987. In that "unusual case," the defendant, described as a " 'gofer' " to one of the principal conspirators, received a sentence at the bottom of the advisory Guidelines range, but it was also "more than ten years longer than the highest

sentence of the other defendants that went to trial, and the same sentence that a high-ranking conspirator received in a related prosecution." *Id.* at 987-88. The Seventh Circuit ordered a limited remand of the defendant's sentence. *Id.* at 989.

Further, the First, Second, Eighth and Eleventh Circuits have not definitively decided this issue. After rendering its decision below in *Fernandez*, the Second Circuit clarified that it has not specifically determined whether § 3553(a)(6) applies to co-defendant and co-conspirator disparity. *See United States* v. *Florez*, 447 F.3d 145, 157 (2d Cir. 2006) ("[W]e have not ruled, post-*Booker*, as to whether [Section 3553(a)(6)] permits district courts to consider sentencing disparities between co-defendants in the same case.") (citations omitted); *accord Fernandez*, Pet. App. 29a n.9 ("leav[ing] resolution of that issue for another day"). In the opinion below, the Second Circuit made clear that, ***assuming*** § 3553(a)(6) applied to co-defendants and co-conspirators, it would only apply to similarly situated defendants. *Fernandez*, Pet. App. 23a-24a. Furthermore, it held that qualifying for safety-valve relief or credit for acceptance of responsibility under the Guidelines renders a defendant dissimilarly situated from one who did not receive these considerations under the Guidelines. *Id.* 4a.

Although these circuits have not decided the issue, some have strongly and repeatedly suggested that Section 3553(a)(6) only applies to nationwide disparities. *See, e.g., Fernandez*, Pet. App. 24a-25a n.9; *accord United States* v. *Saez*, 444 F.3d 15, 18 (1st Cir. 2006) ("Congress did aim to reduce the unwarranted disparity in sentencing for like crimes and criminals. But the aim was almost certainly a ***national*** uniformity focusing upon a common standard and looking to how ***most*** cases

of the same kind were treated.") (citations omitted; emphasis in original); *United States* v. *Boscarino*, 437 F.3d 634, 638 (7th Cir. 2006) (suggesting that "the kind of 'disparity' with which § 3553(a)(6) is concerned is an unjustified difference across judges (or districts) rather than among defendants to a single case").[5]

Finally, in *United States* v. *Morales*, the Eighth Circuit did not decide the issue of whether § 3553(a)(6) can be used to diminish disparate sentences among co-defendants; however, it upheld the decision of the district court to impose a below-Guidelines sentence achieved in part by analyzing the sentence imposed upon the co-defendant, who was given credit for acceptance of responsibility and received the mandatory minimum sentence of 120 months imprisonment. 445 F.3d 1081, 1085-86 (8th Cir. 2006).

The split among circuits, the reluctance to consider the issue by other circuits,[6] and the continuing discord among the district courts all demonstrate a lack of guidance and the need for an authoritative pronouncement on the role of 18 U.S.C. § 3553(a)(6) in co-defendant and co-conspirator sentencing disparities.

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[5] Before *Booker*, however, the Second Circuit recognized that, although co-defendant disparity was not itself a proper basis for departing from the Guidelines, "a sentencing judge is entitled to achieve a result that coincidentally increases or decreases the gap between sentencing ranges applicable to co-defendants" where a proper basis for departing has ***already*** been identified. *United States* v. *Joyner*, 924 F.2d 454, 461 (2d Cir. 1991); *see also United States* v. *Bonner*, 313 F.3d 110, 112 (2d Cir. 2002) (holding "that a district court may consider co-defendants' sentences when considering the extent of a downward departure").

[6] The Fifth Circuit, for instance, has not published any cases with substantial discussion of whether § 3553(a)(6) applies to co-defendant and co-conspirator sentencing disparities.

II. The Holdings of Several Circuits, Including the Second Circuit, Regarding Whether Defendants Have "Similar Records" or Were Convicted of "Similar Conduct" Within the Meaning of 18 U.S.C. § 3553(a)(6), Conflict with this Court's Basic Principles of Statutory Interpretation

The Second Circuit below held that § 3553(a)(6) did not apply to Elias and Mayra Fernandez's sentences because Elias Fernandez received offense-level reductions under the Guidelines for acceptance of responsibility and safety-valve treatment, whereas Mayra did not. Specifically, the Second Circuit held that Elias Fernandez and Mayra "were not similarly situated for many reasons, not the least of which was that Elias [Fernandez], unlike his daughter, qualified under the Guidelines for a three-level reduction for acceptance of responsibility . . . and a two-level 'safety valve' reduction . . . ." Pet. App. 24a (citing *Boscarino*, 437 F.3d at 638, and *United States* v. *Schneiderhan*, 404 F.3d 73, 83 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 381 (2005)). Although the court suggested that other reasons resulted in Mayra and Elias Fernandez not being similarly situated, no other reason was specifically identified in the opinion. The Second Circuit holding is in accord with some circuits, but it conflicts both with other circuits and with the holdings of this Court regarding statutory intepretation.

Like the Second Circuit, the First Circuit and, at times, the Seventh Circuit read into 18 U.S.C. § 3553(a)(6) a requirement that for defendants to be similarly situated for purposes of 18 U.S.C. § 3553(a)(6) they must have received the same credit for acceptance of responsibility or safety-valve treatment. In addition, the First Circuit recently upheld a district court's rejection of the defendant's sentencing disparity claim because " 'the other co-defendants in this case pleaded

guilty, and negotiated their pleas with the U.S. Attorney.' " *United States* v. *Flores-Seda*, 423 F.3d 17, 22 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 1160 (2006); *see also Schneiderhan*, 404 F.3d at 83 (holding that the appellant was not similarly situated with his co-defendants because the co-defendants pleaded guilty while the defendant proceeded to trial and testified falsely at trial).

The Seventh Circuit took the same view in *United States* v. *Boscarino*, where it held that co-defendant disparities justifiably resulted from cooperation pursuant to USSG § 5K1.1. *Boscarino*, 437 F.3d at 638. Specifically, the court held that "Boscarino and Aulenta [his co-defendant] had similarly clean records before these convictions, and they engaged in similar conduct, but a sentencing ***difference*** is not a forbidden 'disparity' if it is justified by legitimate considerations, such as rewards for cooperation." *Id.* (emphasis in original).

This Court has repeatedly held that statutory construction begins with the plain language of the statute. *See Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). Furthermore, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citations and quotation marks omitted). The plain language of § 3553(a)(6) contains no requirement that defendants receive the same credit for acceptance of responsibility or safety-valve treatment under the Guidelines in order to be considered similarly situated for purposes of 18 U.S.C. § 3553(a)(6). Rather, § 3553(a)(6) focuses on whether defendants with "similar records" found guilty of "similar conduct" will receive similar sentences. *See* 18 U.S.C. § 3553(a)(6). The Guidelines were anchored on these two fundamental areas—the criminal

history of the defendant (*i.e.*, the "record"), and the offense of conviction (*i.e.*, the "conduct").

Nowhere does the plain language of 18 U.S.C. § 3553(a)(6) suggest that accepting responsibility or qualifying for safety-valve treatment ***after*** conviction is a "record" akin to one's criminal history, nor the "conduct" for which one is found guilty. Reading the statute in such a way contorts the canons of statutory interpretation. *See Lamie* v. *U.S. Trustee*, 540 U.S. 526, 538 (2004) (noting that petitioner's "argument would result 'not in a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope") (quoting *Iselin* v. *United States*, 270 U.S. 245, 251 (1926); brackets omitted). The Sixth, Eighth, Ninth and, at times, the Seventh Circuit apparently agree that 18 U.S.C. § 3553(a)(6) is not so limiting, as do various district courts.[7] *See supra* cases cited pp. 7-10; *Caperna*, 251 F.3d at 831-32 (rejecting the government's argument that the sentencing court may not depart on the basis of co-defendant disparity if one defendant cooperated with the government and the other did not).

The Eighth Circuit recognized that credit for acceptance of responsibility under the Guidelines may justify some difference among sentences, but that it is not determinative of whether the disparity between sentences is warranted. *See Morales*, 445 F.3d at 1083-84. In

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[7] In doing so, these courts have placed the focus squarely where it should be: whether the difference in the sentence is proportionate to the differences in criminal conduct or criminal records. The Sentencing Commission itself has stated that "[t]he guidelines seek fairness, which is the establishment of sanctions ***proportionate*** to the severity of the crime and the avoidance of unwarranted disparity, by setting similar penalties for similarly situated offenders." U.S. Sentencing Comm'n, 2002 Annual Report 1 (emphasis added).

Morales, the defendant's co-conspirator pleaded guilty and received an adjustment for his acceptance of responsibility, resulting in a term of imprisonment of 120 months, the mandatory minimum. *Id.* Defendant Morales did not qualify for such an adjustment, nor for a finding by the sentencing court that his less culpable role warranted a minor role adjustment. *Id.* at 1085-86. Nevertheless, the sentencing judge refused to impose a Guidelines sentence upon Morales. Although the sentencing court clearly found that some difference between the two sentences was required, "the [sentencing] court also determined that the variance between the sentences of the two co-conspirators should not differ as much as they would if Morales were given a Guidelines sentence." *Id.* at 1084. The court then imposed upon Morales a below-Guidelines sentence of 132 months' imprisonment, 12 months greater than his co-defendant's sentence. *Id.* at 1083-84; *see also McGee*, 408 F.3d 966, discussed *supra* (finding that the defendant's disparity argument regarding his co-conspirators' sentences was "credible" where his sentence was the same as that of a more culpable co-conspirator in a related prosecution, and grossly disproportionate to those of equally culpable co-conspirators who also proceeded to trial).

In *United States* v. *Ortiz-Zayas*, a district court in the Southern District of New York considered the disparity between sentences imposed upon a defendant who pleaded guilty and a co-defendant, who did not. *Ortiz-Zayas*, No. 02-CR-0837, 2005 WL 1430489 (S.D.N.Y. June 17, 2005). There, the defendant, who was convicted after a jury trial, was unable to qualify for safety-valve treatment and, under a Guidelines sentence, would have received a sentence over five times longer than that of his co-defendant. *Id.* at *1, *3. The district court took into account the fact that defendant Ortiz-Zayas had a significant criminal history, whereas his co-defendant,

who pleaded guilty, had no criminal history. *Id.* at *3. It noted that, "[t]hese differences in prior history notwithstanding," a Guidelines sentence imposed on Ortiz-Zayas would be "disproportionately long in comparison to that imposed on [his co-defendant]." *Id.* Although the sentence imposed upon Ortiz-Zayas, who proceeded to trial, was still longer than the sentence imposed on his co-defendant, the district court considered the other factors in 18 U.S.C. § 3553(a) in determining that any other sentencing disparities between the co-defendants were warranted. *Id.*

Based on the foregoing, this Court should review the varied and inconsistent rulings by several Circuit Courts of Appeals regarding "similar records" and "similar conduct" under 18 U.S.C. § 3553(a)(6) to determine if any or all of the rulings comport with this Court's basic standards of statutory interpretation.

Conclusion

WHEREFORE, Petitioner Mayra Fernandez respectfully prays that this Honorable Court grant this petition and issue a writ of *certiorari* to vacate or review the judgment of the Second Circuit, or remand for further consideration, or both, along with any other appropriate relief.

Respectfully submitted,

LANCE CROFFOOT-SUEDE
(*Counsel of Record*)
Appointed Under the Criminal Justice Act of 1964
JOSEPH MACK
VICTORIA ORLOWSKI
LENORE F. HORTON
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

Attorneys for Petitioner

June 29, 2006

APPENDIX

APPENDIX

TABLE OF CONTENTS

	PAGE
United States v. *Fernandez*, 443 F.3d 19 (2d Cir. 2006) (slip copy)	1a
Transcript of Sentencing Hearing for Mayra Fernandez (S.D.N.Y. Mar. 17, 2005).....	31a
Sentencing Memorandum on Behalf of Mayra Fernandez (without attachments)	52a
Presentence Investigation Report for Mayra Fernandez.....	115a
Transcript of Sentencing Hearing for Elias Fernandez (S.D.N.Y. Jan. 26, 2004).....	147a
Second Circuit Brief for Defendant-Appellant (without attachments).....	153a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 05-1596-CR

Argued: October 21, 2005
Decided: April 3, 2006

UNITED STATES OF AMERICA,

Appellee,

—v.—

MAYRA FERNANDEZ, also known as Frank Morena, also known as La Jefa,

Defendant-Appellant.

Before: MINER and CABRANES, *Circuit Judges*, and CURTIN, *District Judge*.*

LANCE CROFFOOT-SUEDE, White & Case LLP, New York, NY, *for Defendant-Appellant.*

RAYMOND J. LOHIER, JR., Assistant United States Attorney (David N. Kelley, United States Attorney,

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* The Honorable John T. Curtin of the United States District Court for the Western District of New York, sitting by designation.

Harry Sandick, Assistant United States Attorney, on the brief), United States Attorney's Office for the Southern District of New York, New York, NY, *for Appellee*.

JOSÉ A. CABRANES, *Circuit Judge*:

We address here several questions relating to our review of sentences in the post-*Booker* era, *see United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), including whether: (1) we possess statutory authority to review a sentence within the relevant United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") range for reasonableness; (2) a sentence within the relevant Guidelines range is entitled to a presumption of reasonableness; (3) the duty to consider the sentencing factors of 18 U.S.C. § 3553(a)[1] requires a

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[1] 18 U.S.C. § 3553(a) provides, in pertinent part, as follows:

> (a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
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> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
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> (2) the need for the sentence imposed—
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> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> (B) to afford adequate deterrence to criminal conduct;
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> (C) to protect the public from further crimes of the defendant; and
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> (D) to provide the defendant with needed educational or vocational training, medical care, or

sentencing judge to discuss on the record during the sentencing proceeding each of the factors or each argument that a defendant makes relating to those factors; (4) 18 U.S.C. § 3553(a)(6), which obligates sentencing judges to consider unwarranted disparities in sentencing, applies to differently situated defendants; (5) we may review a sentencing judge's decision regarding what, if any, weight to ascribe to any particular argument made pursuant to a § 3553(a) factor, when the sentence ultimately imposed is reasonable; (6) a sentencing judge may take a defendant's cooperation with authorities into account pursuant to 18 U.S.C. § 3553(a), even though the Government has not made a motion pursuant to U.S.S.G. § 5K1.1;[2] and (7) in the circumstances presented, defendant's sentence is unreasonably long.

On March 7, 2003, defendant Mayra Fernandez ("Fernandez") was convicted by a jury in the United States District Court for the Southern District of New York

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> other correctional treatment in the most effective manner;
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> (3) the kinds of sentences available;
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> (4) the kinds of sentence and the sentencing range established [in the Sentencing Guidelines;] . . .
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> (5) any pertinent policy statement . . . issued by the Sentencing Commission . . . ;
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> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
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> (7) the need to provide restitution to any victims of the offense.

[2] U.S.S.G. § 5K1.1 provides, in pertinent part, that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."

(Denise Cote, *Judge*) of conspiracy to distribute and to possess with the intent to distribute at least one kilogram of substances or mixtures containing heroin.[3] At the sentencing proceeding on March 17, 2005, Judge Cote determined that the advisory Guidelines range was 151 to 188 months and sentenced Fernandez principally to 151 months of imprisonment followed by five years of supervised release.

Fernandez, who does not challenge on appeal her conviction or the calculation of the advisory Guidelines range, contends that the District Court failed to consider certain 18 U.S.C. § 3553(a) factors in connection with Fernandez's efforts to assist authorities and with the fact that her father, Elias Fernandez ("Elias"), who was a co-conspirator in the charged conspiracy, received a lesser sentence principally of 135 months of imprisonment. In addition, Fernandez maintains that the length of her sentence was unreasonable. We find that Fernandez's arguments lack merit, and we therefore affirm the judgment of the District Court.

BACKGROUND

Fernandez and Elias conducted negotiations with Joaquin Hernandez, a paid confidential informant for the

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[3] It is unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). When a defendant violates that provision with "1 kilogram or more of a mixture or substance containing a detectable amount of heroin," she is subject to a mandatory minimum sentence of ten years of imprisonment. 21 U.S.C. § 841(b)(1)(A)(i). Pursuant to 21 U.S.C. § 846, "[a]ny person who attempts or conspires to commit [the above-described] offense . . . shall be subject to the same penalties as those prescribed for the offense."

Drug Enforcement Administration ("DEA") who was posing as a drug dealer with the ability to transport cocaine and heroin from the Dominican Republic to New York. Elias met with Hernandez virtually every day in July and August 2001. Fernandez, who was introduced to Hernandez by Elias, met with Hernandez approximately four times in the spring of 2002. At the first meeting, Hernandez and Elias went to Fernandez's apartment so that Elias could pick up heroin he was storing there. At the second meeting, Elias and Hernandez again went to Fernandez's apartment so that Elias could pick up heroin, but the heroin to be acquired was found to be damp. Fernandez brought out approximately 50 to 100 grams of heroin, dried the heroin using a hair dryer, and gave Elias devices to cut and weigh the heroin. Elias and Fernandez determined that the heroin was not fit for distribution, and Elias did not complete the contemplated sale. At the third meeting of Hernandez, Elias, and Fernandez, which was also held at Fernandez's apartment, the three discussed a plan whereby Hernandez would travel to the Dominican Republic and return to New York with two kilograms of heroin and thirty kilograms of cocaine. It was understood that upon Hernandez's return, Fernandez would store the drugs in her apartment and would help to distribute them. At a fourth meeting, Hernandez and Fernandez discussed Fernandez's drug contacts in Ecuador.

Before Hernandez's projected smuggling trip to the Dominican Republic, an apparently unrelated shooting occurred outside of Fernandez's apartment. The New York City Police Department ("NYPD") searched the building and discovered in the hallway outside Fernandez's apartment a box containing, *inter alia*, a metal press, latex gloves with the fingers cut off, and glassine envelopes, some of which were stamped "Last Chance."

NYPD detectives found similar glassine envelopes in Fernandez's bedroom. The following day, a more extensive search of Fernandez's apartment was conducted and additional drug paraphernalia, including a digital scale, a dust mask, and more glassine envelopes stamped "Last Chance" were recovered.

On August 27, 2002, DEA agents arrested Fernandez. A one-count indictment charging her with participation in a conspiracy to distribute and to possess with intent to distribute one kilogram or more of heroin in violation of 21 U.S.C. § 846 was filed on October 29, 2002. Trial began on March 3, 2003, and it ended four days later, on March 7, when the jury returned a guilty verdict against Fernandez on the sole count of the indictment. In connection with Fernandez's impending sentencing, the United States Probation Office prepared a Presentence Investigation Report ("PSR"), which concluded that under the Guidelines the offense level was 36,[4] the criminal history category was I, and the Guidelines range was 188 to 235 months.

In Fernandez's sentencing submission, she sought the statutory mandatory minimum sentence, 120 months, either pursuant to a downward departure within the Guidelines scheme or as a non-Guidelines sentence. *See United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005) (explaining that a sentencing judge must consider the advisory Guidelines range and determine whether "([i]) to impose the sentence that would have been imposed under the Guidelines, *i.e.*, a sentence within the applicable Guidelines range or within permissible departure authority, or (ii) to impose a non-Guidelines sentence").

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[4] The parties subsequently agreed that the offense level should be reduced by two levels because the PSR miscalculated the amount of narcotics involved.

She claimed that a decreased sentence would be appropriate because she had provided assistance to the Government and because an unwarranted disparity would otherwise be created by the fact that Elias, who had pleaded guilty to charges stemming from the same drug conspiracy, had been sentenced by Judge Harold Baer, Jr. principally to 135 months of imprisonment. Fernandez also claimed that her culpability was diminished on account of "cultural factors of physical and sexual abuse" and "mental manipulation and coercion," Def.'s Sentencing Mem. at 26, 31, but these arguments, which the Government contended were not proper bases for leniency here and which the District Court rejected at sentencing, have not been pursued on appeal.

In its sentencing submission, the Government explained that it had first met with Fernandez concerning potential cooperation in February 2004, nearly a year after her conviction, in the belief that she had participated in a 2001 robbery that resulted in a homicide and had been a witness to another homicide. In her initial proffer sessions with the Government, Fernandez admitted to participating in the conspiracy underlying the instant conviction and to other criminal activity, including the 2001 robbery and homicide. She provided information that led to the arrest in March 2004 of her co-conspirator in the 2001 robbery, Juan Carlos Vargas. According to the Government, the information that Fernandez supplied was important, but was not alone enough to support the arrest of Vargas. Following Vargas's arrest, the Government claims, Fernandez began to withhold information relating to her prior criminal activity.

In April 2004, Fernandez threatened to kill another inmate in prison. When prison authorities conducted an investigation, Fernandez apparently was not entirely

forthright in recounting the circumstances of the threat. The Government then suspended its proffer sessions with Fernandez, but eventually held one final session in September 2004. At that last session, Fernandez admitted to certain criminal activity about which she had withheld information in prior sessions, but the Government remained unsatisfied with her characterization of the threat she had made against the other inmate, as well as of the circumstances that had led to her earlier transfer between prisons. Consequently, the Government decided not to offer Fernandez a cooperation agreement.

The Government's sentencing submission encouraged the District Court not to accord Fernandez any benefit for her cooperation. Because of her lapses in truthfulness and her erratic behavior, Fernandez was, according to the Government, "useless as a witness for purposes of indicting Vargas and other co-conspirators," and she amounted to a "serious impediment to the Government's prosecution." Gov't's Sentencing Mem. at 19. Furthermore, the Government maintained that in light of Fernandez's behavior, it was "clear that her rehabilitation has not progressed to the point where her efforts at cooperation should lead to a reduced sentence." *Id.* at 20-21. The Government did not specifically refer to Fernandez's argument that she should receive a reduced sentence so as to avoid a disparity with the sentence imposed on Elias.

At sentencing on March 17, 2005, after noting that she had read the sentencing submissions, Judge Cote asserted that the "principal arguments made by defense counsel in terms of a departure or nonguideline sentence are cultural factors, physical and sexual abuse suffered by Ms. Fernandez, mental manipulation, coercion from loved ones and assistance she has provided to the government." Tr. of Sentencing Hr'g, Mar. 17, 2005 ("Tr."),

at 4. Judge Cote explained that the advisory Guidelines range was, at least preliminarily, 151 to 188 months, *see* note 4, *ante*, and then invited the parties to make oral arguments.

In connection with Fernandez's request for a reduced sentence in recognition of her cooperation, her counsel explained that "[w]e're not asking . . . for a [U.S.S.G. §] 5K1.1 letter." Tr. at 18. Instead, counsel explained that Fernandez sought either a "downward departure" or a "nonguideline sentence to a term of 120 months," the statutory mandatory minimum. *Id.* at 19. In relation to Fernandez's efforts to cooperate, counsel specifically argued that "under [18 U.S.C. §] 3553(a)(1)" the Court could take into account her "newfound respect for the law and her personal circumstances" and that she would "not need to show the type of cooperation that a normal cooperator shows" to receive a more lenient sentence. *Id.*

Judge Cote refused to depart downward or to impose a non-Guideline sentence. She addressed Fernandez's cooperation as follows:

> I guess I should also address the issue about cooperation. I think it's fair to say that it was fitful. Ms. Fernandez, facing mandatory minimum term of imprisonment and guidelines range above that—I mean, the government was arguing for a guidelines range at level 36, I believe, and the PSR came in with a guidelines range at a level 36—decided it was in her interest to try to cooperate. But she did not do so in a way that suggests to me that it should be used to lighten her sentence.
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> I mean, cooperation has many components to it. There is the obvious component of assisting the government in the prosecution of other wrongdoers,

but I think that's really only the beginning. Of course there is a significant failure with respect to that component.

But in terms of sentencing, I think cooperation is important because of what light it might shed on the character of a defendant, whether it shows the defendant has recognized the full implications of the choices they made in the past; whether they have decided to make a clean and full break with that and change their life in a significant way. On occasion cooperation really is a reflection of a dramatic change in the person's life. And that resonates in a way, in all the ways that one must consider a sentence, including the likelihood of rehabilitation, the necessity for individual deterrence, the need for additional punishment beyond that already imposed and suffered by a defendant.

And so the fact that Ms. Fernandez was not able ultimately to follow through in a full and complete admission about her criminal activities, was not able to live in an appropriate way within the prison setting, difficult as I'm sure that is, again, undercuts using that brief exploration of what it was like being a cooperator as something that should indicate in this case an alteration to a guidelines sentence.

I'm fully aware that I have the power to depart and that I have the duty to determine what a reasonable sentence is and to consider all the factors under 3553(a). And the sentence I am imposing is based on a consideration of all the evidence before me, the history of Ms. Fernandez in my courtroom, what I learned at trial and my consideration of my discretion under the law.

Id. at 22-24.

The argument in Fernandez's sentencing memorandum that she should receive leniency to avoid a disparity between her sentence and that imposed on Elias was never raised at her sentencing hearing, despite the fact that, as the record makes clear, both parties were afforded ample opportunity to make arguments. Judge Cote did not specifically address the disparity argument on the record.

DISCUSSION

Fernandez contends that the District Court committed procedural error in imposing sentence and subjected her to unreasonable punishment. According to Fernandez, the District Court failed to comply with its obligation to consider the sentencing factors outlined in 18 U.S.C. § 3553(a), *see* note 1, *ante*, because the Court did not lessen her sentence on account of (1) her cooperation with law enforcement authorities and (2) the disparity between the sentence she was to receive and that imposed on Elias. Moreover, she contends that, in the circumstances presented, a sentence including a 151-month term of imprisonment was unreasonably harsh. We conclude that Fernandez has failed to show that the District Court's sentencing procedures were improper or that the resulting sentence was unreasonable.

I. Our Statutory Authority To Review a Sentence for Reasonableness

As a preliminary matter, we address the source of our authority to review a sentence in conformity with the Guidelines, which includes any properly applied departures (a "Guidelines sentence"), for reasonableness.[5]

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[5] The parties did not raise this issue, but we do so *nostra sponte* because of our independent obligation to ensure that we have

Like the Supreme Court in *Booker*, we have previously assumed such authority, *see, e.g., Crosby*, 397 F.3d 103; *see also United States v. Cooper*, 437 F.3d 324, 328 n.5 (3d Cir. 2006) (collecting cases that have assumed without expressly deciding that courts of appeals have jurisdiction to review sentences for reasonableness), but we now specifically locate our authority in 18 U.S.C. § 3742(a),[6] which provides, *inter alia*, for review of sentences "imposed in violation of law." 18 U.S.C. § 3742(a)(1). We hold that when a defendant challenges the procedures of his sentencing proceeding or the reasonableness of the sentence imposed, he effectively claims that the sentence, whether a Guidelines sentence or a non-Guidelines sentence, was "imposed in violation of law," 18 U.S.C. § 3742(a)(1). We therefore have authority to review sentences, whether Guidelines sentences or non-Guidelines sentences, for reasonableness. *See Cooper*, 437 F.3d at 327 ("We believe an unreasonable sentence is 'imposed in violation of law' under 18 U.S.C. § 3742(a)(1)."); *United States v. Martinez*, 434 F.3d 1318, 1322 (11th Cir. 2006) ("Although the Supreme Court in *Booker* did not identify which provi-

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subject matter jurisdiction. *See, e.g., Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 274 (2d Cir. 2005).

[6] 18 U.S.C. § 3742(a) provides:

> A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
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> (1) was imposed in violation of law;
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> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
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> (3) is greater than the sentence specified in the applicable guideline range . . . ; or
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> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

sion of § 3742(a) provided for appeals for 'unreasonableness,' we conclude that a post-*Booker* appeal based on the 'unreasonableness' of a sentence, whether within or outside the advisory guidelines range, is an appeal asserting that the sentence was imposed in violation of law pursuant to § 3742(a)(1)."); *United States v. Frokjer*, 415 F.3d 865, 875 n.3 (8th Cir. 2005) ("After *Booker*, . . . we will review a defendant's argument that even a sentence within the advisory guideline range is 'unreasonable' with regard to the factors set forth in 18 U.S.C. § 3553(a), and an unreasonable sentence would be imposed 'in violation of law' within the meaning of § 3742(a)." (citation omitted)).[7]

II. Standard of Review

The Supreme Court's landmark holdings in *Booker* were handed down in two opinions. The opinion of Justice Stevens addressed the merits of the constitutional challenge to the Guidelines, concluding that the formerly mandatory nature of the Guidelines violated the Sixth Amendment. *Booker*, 543 U.S. at 243-44, 125 S.Ct. 738. The opinion of Justice Breyer set forth the remedy, which consisted of "sever[ing] and excis[ing]" from the Sentencing Reform Act the provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), and the provision containing the relevant standards of review on appeal, 18 U.S.C. § 3742(e). *Booker*, 543 U.S. at 258-59, 125 S.Ct. 738. Pursuant to the "remedy opinion," the now-advisory Guidelines are to be considered, together with the other factors set forth in 18 U.S.C. § 3553(a),

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[7] We need not, and do not, reach the question of whether we are authorized to review sentences for reasonableness independently pursuant to 28 U.S.C. § 1291 (providing that courts of appeals may review final judgments). *See Cooper*, 437 F.3d at 327 n.4.

by judges fashioning sentences. *See id.* at 261-62, 125 S.Ct. 738. In *Crosby,* we outlined a procedure for the implementation of the *Booker* remedy. *See Crosby,* 397 F.3d at 113. We explained that a sentence will satisfy the requirements of *Booker* and the Sixth Amendment if the sentencing judge (1) calculates the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) considers the calculated Guidelines range, along with the other § 3553(a) factors; and (3) imposes a reasonable sentence. *Id.*

Accordingly, while we review a sentence for reasonableness, *see Booker,* 543 U.S. at 261-62, 125 S.Ct. 738, that review involves consideration not only of the sentence itself, but also of the procedures employed in arriving at the sentence. *See Crosby,* 397 F.3d at 114; *see also United States v. Selioutsky,* 409 F.3d 114, 118 (2d Cir. 2005). Reasonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. *See Crosby,* 397 F.3d at 114 (comparing reasonableness review to review for abuse of discretion). Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge "exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact." *Id.* (citations omitted).

We recognize that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances. *See United States v. Mykytiuk,* 415 F.3d 606, 608 (7th Cir. 2005) ("While we fully expect that it will be a rare Guidelines sentence that is unreasonable, the [Supreme] Court's charge that we measure each defendant's sentence against the factors

set forth in § 3553(a) requires the door to be left open for this possibility."). Nonetheless, we have expressed a commitment to avoid the formulation of *per se* rules to govern our review of sentences for reasonableness. *See Crosby*, 397 F.3d at 115; *see also United States v. Fairclough*, 439 F.3d 76, 80 (2d Cir. 2006). We therefore decline to establish any presumption, rebuttable or otherwise, that a Guidelines sentence is reasonable. *See United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc) (explaining that "[w]e do not find it helpful to talk about the guidelines as 'presumptively' controlling or a guidelines sentence as 'per se reasonable,' " because, "[a]lthough making the guidelines 'presumptive' or 'per se reasonable' does not make them mandatory, it tends in that direction; and anyway terms like 'presumptive' and 'per se' are more ambiguous labels than they at first appear"); *Cooper*, 437 F.3d at 331-32 (rejecting a non-rebuttable presumption because it would effectively restore the mandatory nature of the Guidelines and rejecting a rebuttable presumption because "[a]ppellants already bear the burden of proving the unreasonableness of sentences on appeal"). *But see United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006) ("[I]f we determine under the appropriate standard of review that the district court correctly determined the relevant Guidelines range, and if the defendant was subsequently sentenced to a term of imprisonment within that range, then the sentence is entitled to a rebuttable presumption of reasonableness on appeal."); *United States v. Lewis*, 436 F.3d 939, 946 (8th Cir. 2006) ("A sentence falling within the applicable guideline range is presumptively reasonable."); *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006) ("[A] sentence imposed within the properly calculated Guidelines range . . . is presumptively reasonable." (ellipsis in original and

internal quotation marks omitted)); *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006) ("We . . . credit[ ] sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness."); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006) ("We agree with our sister circuits that have held that a sentence within a properly calculated Guideline range is presumptively reasonable."); *Mykytiuk*, 415 F.3d at 608 ("The best way to express the new balance, in our view, is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness."); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir.) (considering a sentence within the applicable Guidelines range to be "presumptively reasonable"), *cert. denied*, — U.S. —, 126 S.Ct. 840, 163 L.Ed.2d 715 (2005). Although the Guidelines range should serve as "a benchmark or a point of reference or departure," *United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir.), *cert. denied*, — U.S. —, 126 S.Ct. 388, 163 L.Ed.2d 173 (2005); *see also Crosby*, 397 F.3d at 113 ("[I]t is important to bear in mind that *Booker*[ ] and section 3553(a) do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge."), for the review of sentences, as well as for their imposition, we examine the record as a whole to determine whether a sentence is reasonable in a specific case. Accordingly, we do *not* hold that a Guidelines sentence, without more, is "presumptively" reasonable.

III. The Disparity Between the Respective Sentences of Fernandez and Elias

Fernandez contends that the District Court committed procedural error by allegedly failing to consider the dis-

parity between the sentence she received and that imposed on Elias. According to Fernandez, Elias had a much more extensive role in the relevant conspiracy and yet was subjected to a shorter period of imprisonment. We conclude that Fernandez has made no showing that Judge Cote failed to consider the disparity. Moreover, we hold that such a disparity between *non-similarly situated* co-defendants is not a valid basis for a claim of error under 18 U.S.C. § 3553(a)(6).

In her sentencing memorandum, Fernandez raised the projected disparity as a consideration pursuant to 18 U.S.C. § 3553(a)(6), which provides that a sentencing court must take into account "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." She argued that this provision counseled in her case against the imposition of a Guidelines sentence, which would cause her to be punished significantly more severely than Elias, who received a sentence principally of 135 months of imprisonment. Fernandez acknowledged that the District Court imposed on Elias what it calculated to be a Guidelines sentence, but argued that his "real offense conduct extends far beyond the amount provided in his guilty plea." Def.'s Sentencing Mem. at 44-45.

Fernandez insists that the District Court failed to consider the disparity argument because there was no discussion of it during the sentencing proceeding, despite the fact that it had been raised in her written submission. Although afforded ample opportunity at sentencing to make whatever arguments she desired and, toward the end of the proceeding, to raise any issues that Judge Cote had not addressed, Fernandez did not present the argument during the sentencing proceeding. The Government suggests that as a result of Fernandez's failure

to raise the argument during the sentencing proceeding, we may be limited to reviewing "for plain error." Gov't's Br. at 27. The Government fails to point to any authority, however, for the proposition that a defendant who has properly presented an argument in a written submission is under an obligation affirmatively to raise it again at a hearing in order to preserve the point for ordinary appellate review, and we are not inclined to create such a requirement. On the other hand, we may take the fact that the argument was not explicitly raised by the parties during the sentencing proceeding into account when evaluating Fernandez's contention that the District Court's failure to discuss the argument on the record during the sentencing proceeding indicates that the District Court failed to consider that argument.

When an argument is not raised during a sentencing proceeding, the failure of the sentencing judge to address that argument explicitly on the record does *not*, without more, demonstrate a failure of consideration by the judge. Rather, we entertain a strong presumption that the sentencing judge has considered all arguments properly presented to her, unless the record clearly suggests otherwise. This presumption is especially forceful when, as was the case here, the sentencing judge makes abundantly clear that she has read the relevant submissions and that she has considered the § 3553(a) factors.

Fernandez contends that because a judge cannot satisfy her obligation to consider the Guidelines "by a general reference to the entirety of the Guidelines Manual," *Crosby*, 397 F.3d at 111, but rather must, in the ordinary case, calculate the applicable Guidelines range, "[p]resumably, the converse is true—a sentencing court fails to 'consider' the other factors listed in § 3553(a) by making general reference to them and then choosing to impose a Guidelines sentence." Def.-Appellant's Br. at

15. Although there is some surface appeal to that argument—essentially, that if "consider" usually implies specific discussion on the record in the context of the applicable Guidelines range, it probably means much the same thing in the context of the other § 3553(a) factors—the argument conflates what are, in fact, distinct procedural requirements. A sentencing judge's obligation to consider the advisory Guidelines range generally amounts to a duty to take into account a particular recommended sentencing range. If the judge improperly calculates that range, she cannot be said to have genuinely considered it. We therefore ordinarily require a sentencing judge to put her Guidelines calculations on the record. *See Crosby*, 397 F.3d at 112.

We have imposed no similar requirement that a sentencing judge *precisely identify* either the factors set forth in § 3553(a) or specific arguments bearing on the implementation of those factors in order to comply with her duty to consider all the § 3553(a) factors along with the applicable Guidelines range. *See id.* at 115 ("[A] sentencing judge would commit a statutory error in violation of section 3553(a) if the judge failed to 'consider' the applicable Guidelines range (or arguably applicable ranges) as well as the other factors listed in section 3553(a)."). Consideration of the § 3553(a) factors is not a cut-and-dried process of factfinding and calculation; instead, a district judge must contemplate the interplay among the many facts in the record and the statutory guideposts. That context calls for us to "refrain[ ] from imposing any rigorous requirement of specific articulation by the sentencing judge." *Crosby*, 397 F.3d at 113; *see also Jiménez-Beltre*, 440 F.3d at 519 ("[A] court's reasoning can often be inferred by comparing what was argued by the parties or contained in the pre-sentence report with what the judge did."). As we have explained,

> We appreciate that lexicographers, contemplating various contexts in which the word "consider" is used, might infuse the word with a meaning that implies a measure of sustained reflection. But our context is that of experienced district judges, familiar with both the substantive content of relevant law and procedural requirements, who face the daunting task of administering heavy caseloads. In this context, we continue to believe that no specific verbal formulations should be prescribed to demonstrate the adequate discharge of the duty to 'consider' matters relevant to sentencing. *As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred.*

United States v. Fleming, 397 F.3d 95, 100 (2d Cir. 2005) (emphasis added).

Accordingly, we presume, in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors. *See Williams*, 436 F.3d at 708 (commenting that consideration under the post-*Booker* regime "need not be evidenced explicitly" and rejecting the argument that the District Court failed to consider the § 3553(a) factors where the defendant "fail[ed] to point to any indication that the district court ignored those factors"); *United States v. Ayers*, 428 F.3d 312, 315 (D.C.Cir. 2005) (explaining that when a defendant fails to object to the lack of an explanation on the record for the imposition of a sentence within the Guidelines range, "we begin our review with the presumption that the district court knew and applied the law correctly" and also

establishing a presumption that a judge imposing a non-Guidelines sentence "took into account all the factors listed in § 3553(a) and accorded them the appropriate significance" (internal quotation marks omitted)); *see also Walton v. Arizona*, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) ("Trial judges are presumed to know the law and to apply it in making their decisions."), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 589, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In other words, no "robotic incantations" are required to prove the fact of consideration, *Crosby*, 397 F.3d at 113 (internal quotation marks omitted); *see also Lewis*, 436 F.3d at 946 (stating that "sentencing courts are not obligated to provide robotic incantation [about] each statutory factor . . . considered" (alteration in original and internal quotation marks and citation omitted)),[8] and we will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument relating to

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[8] Of course, we continue to encourage sentencing judges to facilitate our review by providing complete and detailed explanations regarding their sentencing decisions. *See Crosby*, 397 F.3d at 116 ("District judges will, of course, appreciate that whatever they say or write in explaining their reasons for electing to impose a Guidelines sentence or for deciding to impose a non-Guidelines sentence will significantly aid this Court in performing its duty to review the sentence for reasonableness."); *United States v. Fuller*, 426 F.3d 556, 567 (2d Cir. 2005) (urging that "for the purpose of facilitating reasonableness review, the better practice is for the district court to record in its written order of judgment an explanation for all Guidelines departures"); *see also* 18 U.S.C. § 3553(c) (mandating that a district court "state in open court the reasons for its imposition of the particular sentence"); *id.* § 3553(c)(2) (requiring a district judge to state "the specific reason" for imposing a sentence that reflects a departure from the otherwise applicable Guidelines range).

those factors that the defendant advanced. Our holding is consistent with those of other Circuits that have considered this question. *See United States v. Martinez-Martinez*, 442 F.3d 539, 543 (7th Cir. 2006) ("Although the district court did not specifically articulate its view on the weight to be accorded the issue of sentencing disparity in light of § 3553(a)(6), it was not required to discuss each factor's effect on the sentence."); *United States v. Walker*, 439 F.3d 890, 892 (8th Cir. 2006) ("Although a district court is required to consider each of the § 3553(a) factors in determining the proper sentence to impose, it need not categorically rehearse each of the [§] 3553(a) factors on the record when it imposes a sentence as long as it is clear that they were considered." (alteration in original and internal quotation marks omitted)); *United States v. Eura*, 440 F.3d 625, 634 (4th Cir. 2006) (noting that a sentencing judge "was not required to discuss each § 3553(a) factor on the record"); *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006) (commenting that "a checklist recitation of the section 3553(a) factors is neither necessary nor sufficient for a sentence to be reasonable"); *United States v. Sylvester Norman Knows His Gun, III*, 438 F.3d 913, 918 (9th Cir. 2006) (explaining that consideration of § 3553(a) factors "does not necessitate a specific articulation of each factor separately"); *Cooper*, 437 F.3d at 329 (To comply with the obligation to consider the § 3553(a) factors, a "court need not discuss every argument made by a litigant if an argument is clearly without merit."); *Williams*, 436 F.3d at 708-09 ("Although the district court may not have mentioned all the [§ 3553(a)] factors . . . explicitly, and although explicit mention of those factors may facilitate review, this court has never required the ritual incantation of the factors to affirm a sentence." (alteration in original and internal quotation

marks omitted)); *United States v. Scott*, 426 F.3d 1324, 1329 (11th Cir. 2005) ("We now . . . squarely hold that nothing in *Booker* or elsewhere requires the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors."); *United States v. Contreras-Martinez*, 409 F.3d 1236, 1242 (10th Cir. 2005) ("[T]he sentencing court is not required to consider individually each factor listed in § 3553(a) before issuing a sentence. Moreover, we do not demand that the district court recite any magic words to show us that it fulfilled its responsibility to be mindful of the factors that Congress has instructed it to consider." (citation and internal quotation marks omitted)); *United States v. George*, 403 F.3d 470, 472-73 (7th Cir.) ("Judges need not rehearse on the record all of the considerations that 18 U.S.C. § 3553(a) lists; it is enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less."), *cert. denied*, — U.S. —, 126 S.Ct. 636, 163 L.Ed.2d 515 (2005); *cf. Jiménez-Beltre*, 440 F.3d at 528 (Lipez, J., dissenting) (noting that a sentencing judge cannot rely on "formulaic invocation of the words of the statute," but rather must provide "explanations that are responsive to the sentencing issues raised by the parties and that relate the court's decisions on those issues to the multiple purposes and factors of section 3553"). In sum, our practice in reviewing consideration of the § 3553(a) factors is to exercise "restraint, not micromanagement." *Fleming*, 397 F.3d at 100. Fernandez has made no showing that the District Court failed to consider her disparity argument.

In any event, even assuming *arguendo* that 18 U.S.C. § 3553(a)(6) can support a reduced sentence designed to eliminate or diminish disparity between the sentences

imposed on co-defendants,[9] those co-defendants would have to be similarly situated because the provision mandates that sentencing judges take into account "*unwarranted* sentence disparities among defendants with *similar* records who have been found guilty of *similar* conduct." 18 U.S.C. § 3553(a)(6) (emphases added). Elias and Fernandez were not similarly situated for many reasons, not the least of which was that Elias, unlike his daughter, qualified under the Guidelines for a three-level reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1 and a two-level "safety valve" reduction pursuant to U.S.S.G. §§ 2D1.1(b)(7) and 5C1.2. *See United States v. Boscarino*, 437 F.3d 634, 638 (7th Cir. 2006) ("[A] sentencing *difference* is not a forbidden 'disparity' if it is justified by legitimate considerations, such as rewards for cooperation." (emphasis in original)); *United States v. Vasquez*, 433 F.3d 666, 671 (8th

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[9] The plain language of § 3553(a)(6) seems not to prohibit judges from considering disparities between co-defendants. *See* 18 U.S.C. § 3553(a)(6) (directing that sentencing judges consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct"). However, as we have recognized in the context of evaluating the propriety of a departure within the Guidelines scheme, the Sentencing Reform Act of 1984 ("SRA"), Pub.L. 98-473, Chapter II, §§ 211-238, 98 Stat. 1987 (1984), whence the language in § 3553(a)(6) comes, *see* SRA § 212(a), 98 Stat. at 1990, was intended to "eliminat[e] disparity on a *national* level." *United States v. Tejeda*, 146 F.3d 84, 87 (2d Cir. 1998) (emphasis in original); *see also* U.S.S.G. Ch. 1, Pt. A, intro. cmt. (discussing Congress's intention in passing the SRA to reduce the "wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders"). In light of the SRA's goal of *national* consistency in sentencing, there is disagreement over whether § 3553(a)(6) may support a non-Guidelines sentence for the purpose of preventing a disparity between sentences imposed on co-defendants. *Compare United States v. Boscarino*, 437 F.3d 634, 638 (7th Cir.2006) (suggesting that "the kind of 'disparity'

Cir. 2006) (determining that a sentencing disparity was "not unwarranted" where defendant "was responsible for a larger quantity of drugs and had a greater criminal history than [his co-defendant]"); *United States v. Schneiderhan*, 404 F.3d 73, 83 (1st Cir.) (finding no unwarranted sentencing disparity where the co-defendants who were subjects of comparison "pleaded guilty to obstructing justice, eliminating the 'lack of remorse' rationale that influenced the sentence imposed on defendant"), *cert. denied*, — U.S. —, 126 S.Ct. 381, 163 L.Ed.2d 167 (2005); *see also Jiménez-Beltre*, 440 F.3d at 519 ("As with departures, the proponent of a factor that would work in the proponent's favor has to provide the basis to support it."). Moreover, even if § 3553(a)(6) were a lawful basis for leniency here, the requirement that a sentencing judge consider an 18 U.S.C. § 3553(a) factor is *not* synonymous with a requirement that the factor be given determinative or dispositive weight in the particular case, inasmuch as it is only one of several factors that must be weighted and balanced by the sentencing judge. *See Martinez-Martinez*, 442 F.3d at 543 ("That some courts have chosen to avoid disparity does not mean that all district courts are compelled to adjust a sentence downward from the advisory guidelines range in order for that sentence to be reasonable.") The weight to be afforded any given argument made pursuant to one

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with which § 3553(a)(6) is concerned is an unjustified difference across judges (or districts) rather than among defendants to a single case"), *with United States v. Ortiz-Zayas*, No. 02 Cr. 0837, 2005 WL 1430489, at *3 (S.D.N.Y. June 17, 2005) ("Since *Booker*, a growing number of courts have held that sentencing judges are no longer prohibited from considering the disparity between codefendants in fashioning a reasonable sentence." (internal quotation marks omitted)). In light of our conclusion that Fernandez and Elias were not similarly situated, we leave resolution of that issue for another day.

of the § 3553(a) factors is a matter firmly committed to the discretion of the sentencing judge and is beyond our review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented. *See Jiménez-Beltre*, 440 F.3d at 419 ("Assuming a plausible explanation and a defensible overall result, sentencing is the responsibility of the district court.").

In sum, we conclude that Fernandez's claim of procedural error based on the District Court's silence on one of her arguments (relating to the disparity between her sentence and Elias's) is unpersuasive. The absence of explicit discussion of Fernandez's specific argument—which was not raised at the sentencing hearing—does not overcome our strong presumption that the District Court faithfully performed its statutory obligation to consider the § 3553(a) factors.

IV. Fernandez's Cooperation with the Government

Fernandez argues that the District Court "may not have appreciated its discretion to consider Ms. Fernandez's cooperation with the government" pursuant to 18 U.S.C. § 3553(a)(1). Def.-Appellant's Br. at 21. According to Fernandez, even though the Government did not make a motion regarding substantial assistance pursuant to U.S.S.G. § 5K1.1, *see* note 2, *ante*, she may nonetheless benefit from her efforts to cooperate insofar as they shed light on her "history and characteristics." 18 U.S.C. § 3553(a)(1).[10] At Fernandez's sentencing hearing, the Government conceded that "under 3553(a) the Court's empowered to consider virtually any factor in sentencing." Tr. at 12.

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[10] While Fernandez's counsel limited his argument regarding the relevance of cooperation to § 3553(a)(1), we note that cooperation may be relevant to other § 3553(a) factors as well.

We agree that in formulating a reasonable sentence a sentencing judge must consider "the history and characteristics of the defendant" within the meaning of 18 U.S.C. § 3553(a)(1), as well as the other factors enumerated in § 3553(a), and should take under advisement any related arguments, including the contention that a defendant made efforts to cooperate, even if those efforts did not yield a Government motion for a downward departure pursuant to U.S.S.G. § 5K1.1 ("non-5K cooperation"). Section 3553(a)(1), in particular, is worded broadly, and it contains no express limitations as to what "history and characteristics of the defendant" are relevant. This sweeping provision presumably includes the history of a defendant's cooperation and characteristics evidenced by cooperation, such as remorse or rehabilitation.

Fernandez argues that Judge Cote did not comprehend her post-*Booker* authority on the basis of the judge's statement that Fernandez's conduct in prison and her inability to cooperate in a manner that satisfied the Government "undercut[ ] using that brief exploration of what it was like being a cooperator as something that should indicate in this case an alteration to a guideline sentence." Tr. at 24. According to Fernandez, that statement shows that the District Court "neglected to address the defense's argument that Ms. Fernandez's efforts should be taken into account under 18 U.S.C. § 3553(a)(1)." Def.-Appellant's Br. at 20. We disagree.

Even if, as Fernandez argues, the District Court's reference to "an alteration to a guideline sentence," standing alone, might be interpreted as a misapprehension that a Guidelines sentence should presumptively be imposed, that phrase could not overcome the clear indication in the record that the Court was well aware of its authority to impose a non-Guidelines sentence and its duty to con-

sider "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), as well as all the other § 3553(a) factors. Judge Cote discussed Fernandez's cooperation at length and recognized "that I have the power to depart *and* that I have the duty to determine what a reasonable sentence is and to consider all the factors under 3553(a)." Tr. at 24 (emphasis added). The judge thoughtfully evaluated Fernandez's cooperation, including "what light it might shed on the character of a defendant," concluding that the cooperation was "fitful" and that it should not "be used to lighten her sentence." *Id.* at 22-23.[11]

As discussed above, we do not require any "specific articulation by the sentencing judge," *Crosby*, 397 F.3d at 113, to prove that a judge has considered the § 3553(a) factors. Judge Cote's explanation made clear that she fully understood her duty and her authority in the post-*Booker* sentencing regime, considered Fernandez's particular efforts to cooperate and what those efforts showed about this defendant's "history and characteristics," 18 U.S.C. § 3553(a)(1), and dutifully exercised her discretion in formulating a reasonable sentence. In addition, we underscore that the requirement that the sentencing judge consider a § 3553(a) factor that may cut in a defendant's favor does not bestow on the defendant

[11] It was not error for Judge Cote to employ the Guidelines range as a starting point and then to determine whether the arguments presented pursuant to the § 3553(a) factors warranted "lighten[ing]" of, Tr. at 23, or fashioning of "an alteration to," *id.* at 24, the advisory Guidelines sentence (or, in other words, imposing a non-Guidelines sentence). *See Crosby*, 397 F.3d at 112 (directing that "[t]he applicable Guidelines range is normally to be determined in the same manner as before *Booker*[ ]"); *see also Rubenstein*, 403 F.3d at 98-99 (characterizing the Guidelines in post-*Booker* sentencing as "a benchmark or a point of reference or departure").

an entitlement to receive any particular "credit" under that factor. If the ultimate sentence is reasonable and the sentencing judge did not commit procedural error in imposing that sentence, we will not second guess the weight (or lack thereof) that the judge accorded to a given factor or to a specific argument made pursuant to that factor. Although Judge Cote had the power, as long as the sentence imposed was reasonable, to reduce Fernandez's sentence in light of "non-5K cooperation" under 18 U.S.C. § 3553(a), she was under no obligation to provide any such benefit.

V. The Reasonableness of the Sentence Imposed

In connection with the arguments discussed above, Fernandez argues that the 151-month term of imprisonment to which she was principally sentenced was "unreasonably long." Def.-Appellant's Br. at 25. The term of imprisonment imposed, which was at the floor of the applicable Guidelines range, was thirty-one months above the mandatory minimum, but far below the statutory maximum of life imprisonment. Upon a consideration of the entire record, we conclude that the sentence was well within the broad range of reasonable sentences that the District Court could have imposed in the circumstances presented.

CONCLUSION

In conclusion, we hold that:

(1) the Court of Appeals has authority to review a sentence for reasonableness pursuant to 18 U.S.C. § 3742(a)(1);

(2) the sentencing judge need not address on the record each of the 18 U.S.C. § 3553(a) factors, nor

each argument that a defendant makes with reference to those factors, in order to comply with her obligation to consider the factors;

(3) in the absence of record evidence suggesting the contrary, we entertain a strong presumption that a sentencing judge has taken properly presented arguments into account and considered all the § 3553(a) factors in the course of imposing a sentence;

(4) though we do not reach whether § 3553(a)(6) may support a non-Guidelines sentence for the purpose of preventing a disparity between sentences imposed on co-defendants, that provision relates only to "unwarranted" disparity between similarly situated defendants;

(5) a sentencing judge may take "non-5K cooperation" into account when considering the § 3553(a) factors;

(6) the requirement that a sentencing judge consider a § 3553(a) factor does not mandate that a defendant actually be granted "credit" under that factor, and the weight to be afforded any given argument made pursuant to one of the § 3553(a) factors is beyond our review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented; and

(6) in the particular circumstances presented here, a sentence including a 151-month term of imprisonment was not unreasonable.

* * * *

Accordingly, we conclude that Fernandez has failed to show that the sentence imposed on her was unreasonable. We therefore Affirm the judgment of the District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

New York, N.Y.
02 CR 1398 (DLC)

March 17, 2005
11:00 a.m.

UNITED STATES OF AMERICA,

—v.—

MAYRA FERNANDEZ,

Defendant.

Before:

HON. DENISE L. COTE,

District Judge

APPEARANCES

DAVID KELLEY
United States Attorney for the
Southern District of New York

BY: HARRY SANDICK
RAYMOND LOHIER
Assistant United States Attorneys

JOSEPH MACK
LANCE CROFFOOT-SUEDE
VICTORIA ORLOWSKI
Attorneys for Defendant

SPANISH INTERPRETER: NANCY ADLER

(case called).

MR. SANDICK: Harry Sandick and Raymond Lohier for the government.

MR. MACK: Joseph Mack for Mayra Fernandez, CJA counsel Lance Croffoot-Suede and Victoria Orlowski, all for Ms. Fernandez.

THE COURT: Good morning. We are assisted this morning by an interpreter, who is certified to interpret between Spanish and English. And please swear the interpreter.

(Interpreter affirmed)

THE COURT: Ms. Fernandez, if you have any difficulty understanding what is being said through the interpreter, will you let me know immediately, please.

THE DEFENDANT: Yes, your Honor.

THE COURT: Mr. Mack, have you and your client reviewed the presentence report?

MR. MACK: Yes, we have, your Honor.

THE COURT: Have you discussed it with each other?
MR. MACK: Yes, we have.

THE COURT: Has it been interpreted or translated to the defendant?

MR. MACK: Yes, it has.

THE COURT: Good. Do you have any objections to the report?

MR. MACK: We do. And we notified Mr. Jean Baptiste of such objection back in December 2004, I believe.

THE COURT: And other than what's contained in your written memorandum, do you have any other objections?

MR. MACK: No, we do not. It's all contained in the written submission.

THE COURT: Thank you. The presentence report will be made part of the record in this case and placed under seal. If an appeal is taken, counsel on appeal may have access to the sealed report without further application to this Court.

I have received a sentencing memorandum on behalf of Ms. Fernandez with many exhibits, which I've read. There was a—doesn't appear to be dated, but it was received by me on February 11th. We have the government's response of February 25th, and a reply memorandum, again undated, but received by me on March 7th.

MR. MACK: I've just been informed by the government that they didn't receive the reply memorandum, but we had it served upon them.

THE COURT: My copy does not have an affidavit of service. So we'll take a recess to give the government an opportunity to read the reply memorandum.

Do you have a copy for them?

MR. MACK: Yes.

(Recess).

THE COURT: Has the government had an opportunity now to read the reply memorandum?

MR. SANDICK: I have, your Honor. Thank you very much.

THE COURT: I did give the defendant permission to file a limited portion of its sentencing memorandum under seal. It had to do with efforts of the defendant to cooperate with the government, and those details are under seal and will remain so.

There is some dispute about the appropriate offense level here. And there are in effect departure motions and motions for a nonguideline sentence. I think it would be helpful if I tell you where I am preliminarily with respect to offense level and give you an opportunity then to focus your arguments.

I believe the correct offense level is offense level 34. It's agreed that criminal history category is criminal history category I. And the principal arguments made by defense counsel in terms of a departure or nonguideline sentence are cultural factors, physical and sexual abuse suffered by Ms. Fernandez, mental manipulation, coercion from loved ones and assistance she has provided to the government.

In its reply memorandum there is some discussion also of family circumstances and a request generally that I either, through a departure or a nonguideline sentence or through a different finding about offense level, sentence the defendant to 120 months, the mandatory minimum term of imprisonment that applies in this case. So as of now, assuming there is no difference following argument, the guidelines range would be 151 months to 188 months.

I'll hear from the government.

MR. SANDICK: Your Honor, based on your Honor's preliminary calculation of the guidelines, I won't address the guidelines issues because I think what your Honor

has proposed is essentially what the government believes is appropriate in terms of offense level.

The government does believe that a sentence within the guidelines range here is appropriate, both under Section 3553(a), and as well taking a step back, under the sentencing guidelines departures, both recognized grounds for departures as well as the 5K2.0 *Koon* departures for extraordinary circumstances not otherwise taken into account.

The government's argument, I think reduced to its essence, is that even conceding that Mayra Fernandez has had a difficult life and grew up in a country that does have sexism and a harsh, sort of a harsh life for the people of the Dominican Republic, that those factors and her own childhood abuse, and she has described it, are not sufficiently connected to the crime that's being committed here to merit either a downward departure under the guidelines or a sentence outside of the guidelines under Section 3553(a). That in order to satisfy the established downward departure grounds, there generally has to be a closer connection alleged.

And here, just sort of going through them one by one, the person who in her family who she most closely conspired with was her father, Elias Fernandez, who was of course prosecuted in this district. She doesn't allege in her papers that she's suffered physical abuse from him.

She essentially alleges that she committed the offense as a part of a way of trying to win his approval; that he was an absent father during portions of her childhood and that when she came to the United States as a young adult, she became swept up in his criminal activity. And that in order to win his approval, which she had found wanting previously, she participated in this offense.

And the government's view is that even if those facts are true and those were the defendant's motivations, they

don't rise to the level sufficient for a downward departure; that, in fact, many people commit crimes for complicated sets of reasons. Sometimes financial, but sometimes personal. And people are frequently committing offenses with family members, whether they be fathers, spouses, cousins, siblings, and that essentially committing a crime in order to win family approval is not something unusual, doesn't take it out of the heartland, it doesn't distinguish it from any of the cases that we see in this courthouse. And under Section 3553(a), there's no reason to think that it merits a reduction in sentence when you consider the defendant's personal circumstances.

Again, it's not an unusual situation for somebody to commit crimes with their father or with a sibling or with a spouse. And in fact, the downward departure cases involving family-committed crimes very much make the point that the government's trying to make here orally, essentially just to sort of address what those cases discuss, the principal point here, your Honor. And some of the cases that we've cited on page 14 of our brief, *King*, *Contrares*, are cases where people essentially are saying that they became involved in crime because of the devoted commitment to their father.

The Tenth Circuit has held that while a parent's unique position vis-a-vis their child may result in ability to wield significant influence, but that you then have to look and say—and try to consider whether there was actually coercion, not just the usual influence that a parent has over a child, or again, some of the analogies in the *Posey* case from the First Circuit, in which a husband and wife relationship is the issue. And the wife claimed essentially that she felt she had no alternative but to help her husband commit the drug crime. But at the same

time there were—there was no evidence of coercion, there was no evidence of threats.

And that's what we have here, that even assuming that what Mayra Fernandez has told us through her attorneys is truthful, it doesn't rise to the level where a reduced sentence is appropriate. It's not sufficiently connected to the crime here; the desire to please your father is not the same as coercion or threats or something really unusual, something that needs to be taken into account that the guidelines don't take into account.

And in terms of the childhood abuse allegations, as the government notes, much of what has been said is not corroborated, and the Court can consider that in its analysis. But even if the assertions are true, there just isn't a sufficient connection between the people who abused her in her childhood and the crime that's committed here. There's nothing in the case law under the guidelines that suggests that simply having a difficult childhood in and of itself is a basis for a downward departure.

And the government would suggest that under 3553(a), it doesn't show granting a reduction or showing leniency under 3553(a), based on a difficult childhood or lack of guidance as a youth, would not properly serve the respect for law. Even people who have difficult childhoods are still required to comply with the law.

And it's frequently the case, as I think it's the Seventh Circuit, one of the cases that the government cites in this brief makes out—actually it's the Fifth Circuit, that childhood abuse and neglect are often present in the lives of criminals and they always affect the mental and emotional condition of defendants. But that fact does not in and of itself create a basis for a downward departure.

What it does is maybe helps explain the rationale for treatment while incarcerated, maybe for post-incarceration treatment and things like that that can be used. And

I think Ms. Fernandez has already started participating in some of these programs for ways of trying to help her. But it doesn't justify her crime, it doesn't reduce the seriousness of her crime and doesn't support a more lenient sentence.

The other issue that is discussed quite a bit in the parties' submissions is the question of Ms. Fernandez's cooperation. And I think the facts are fairly closely laid out by the government in our brief.

But just to sort of review what happened, after a long period of time during which the government was unable or unwilling to meet with Ms. Fernandez because of her inability to admit the crime that she was committed of here, the government did finally meet with her in February of 2004. She did provide information. And an individual, Juan Carlos Vargas, whose a/k/a is Cuco, C-U-C-O, was arrested based on that information. And that is factually accurate.

But what happened after that is that Ms. Fernandez sort of veered sharply off the course of cooperation that she started out on. She acted in an untruthful manner in our meetings, failing to admit additional crimes that she had committed, denying that she had committed certain crimes that, in fact, she had committed. And she then acted in a—what can only really be described as a bizarre and erratic way with her fellow inmates and with prison authorities at the MDC, which was her second institution. She was transferred there because of difficulties that she was having at the MCC here in Manhattan. Stating that she would attempt to kill another inmate if she saw that inmate. Essentially accusing many inmates of conspiring against her.

Prison authorities who interviewed her believed that she was exaggerating and embellishing her remarks. So in her failure to come completely clean with the gov-

ernment and in her failure to conform her behavior to what's expected of inmates in the federal system, she basically made herself unusable to us as a cooperator, so that we were not in a position to indict Juan Carlos Vargas, the person who we arrested in part based on her information. We weren't in a position to arrest other targets in that investigation, and the investigation has been impaired by her unavailability to us.

The government also thinks it's worth noting that in a typical case, the defendant who gets sentenced and receives credit for cooperation is—has been convicted of the crimes which they've participated in, which they've provided information about. And here this defendant appears before your Honor, she hasn't pled guilty to the crimes that she's provided information about. She's not being sentenced on those crimes.

And the government's view, given her unavailability to us, given her failure to come clean completely, given her essentially given the fact she's not doing most of the things that cooperating witnesses do, namely provide assistance that results in an indictment, help prepare for trial, testify at trial if need be, she's not doing any of these things, she can't do any of these things because she has made herself unusable through her continued erratic behavior and through her failure to be completely straightforward with the government.

So essentially what she's asking for is the benefit that a cooperating witness would receive without taking any of the steps either to help the government or to plead guilty and accept responsibility for those crimes that cooperating witnesses typically take, and that it would essentially send the wrong message under 3553(a) for defendants to believe that as long as they provide some information, it leads to an arrest, they can then basically veer off and make themselves unusable but still receive

credit for that initial arrest. It's unfair, the government would submit, to cooperators who do all the things that cooperating witnesses do, namely plead guilty, accept full responsibility, remain completely truthful, comply with prison rules, not commit additional crimes, not threaten to kill fellow inmates, and then be available for indictment and trial.

And so while the government concedes under 3553(a) the Court's empowered to consider virtually any factor in sentencing, the government's view as expressed in the letter is that it's dangerous territory to give credit for cooperation to people who have not fully cooperated, and it sends the wrong message to other prisoners and to other inmates about how the cooperation process could work. Essentially her implosion during the cooperation process is in part a reflection on the limited extent of her rehabilitation.

I believe that covers all of the issues raised in the defense submission, but of course, if there are additional questions, we're happy to answer them.

THE COURT: Thank you, Mr. Sandick.

So, Mr. Mack, are you making a presentation on behalf of the defendant?

MR. MACK: I am. I'd just like to respond to the points that Mr. Sandick raised, and I will attempt to respond to them in the order presented.

I guess the first area was Mr. Sandick and the government submits that there is not sufficient connection between Ms. Fernandez's physical and sexual abuse and the coercion that she suffered at the hands of her father and the offense of conviction.

Without belaboring the Court with too much background, the Court is familiar with, as Mr. Sandick said, the cultural factors in the Dominican Republic. At a

young age, women learn to be subservient. They—the males are the heads of the household. And domestic abuse, child abuse and rape are endemic and often go unreported. Against that background, Elias Fernandez left Mayra and her family when she was four years old. As described in defense's submissions, there was physical and sexual abuse that Ms. Fernandez suffered between approximately the age of four and approximately the age of 12 when she abandoned her family and—

THE COURT: Now, I read the letters you've submitted from family members in this voluminous submission, and I didn't find in these letters the kind of supporting information about what happened in the family that one would have expected.

MR. MACK: We have included the information in our submissions based upon our discussions with Ms. Fernandez. And I respectfully submit, your Honor, that it would not be the first time that family members would not admit that they were abused as children. We did not request the family members to explain any abuse that they suffered personally; we just asked them to submit letters to the Court in support of Ms. Fernandez's sentence.

THE COURT: Okay.

MR. MACK: I agree there's no written corroboration, your Honor.

Moving forward, at age 12 she runs away from her family and becomes impregnated with an older lover, Mr. William Enriquez, this is the same William Enriquez who years later was responsible for the murder of Ms. Fernandez's husband—boyfriend, Jose Ventura, and that's explained in the PSR. So she's 13 years old, she

has her first child, Wismary, by Cesarean section. Several years later she leaves the Dominican Republic.

She's here in America, she doesn't speak English, she has no employable skills. She has a very low-level education. She becomes reunited with her father. Her father knows the cultural background in which she grew up, and he knows that he's running a heroin distribution ring. And he could use someone like Mayra to store his drugs. And he pled guilty, your Honor, in the Southern District to conspiring to distribute narcotics for a period of over four-and-a-half years, so he was in business when she came to America.

And he cajoled her and tempted her. He said if you—and I'm not submitting this is an actual conversation, but in essence—I'll put you up in an apartment, just let me store my drugs there. Mayra has no job, she has two kids at this point because she has been impregnated by another career criminal, a gentleman by the name of Juan Val Dara. All of the people surrounding her live lawless lives. Her own father is running a heroin distribution ring. His girlfriend's helping him out, Maria Irizarry. She's also pled guilty in the Southern District. Her cousin, Richard Fernandez, also involved in drugs. Both of her husbands, as I've described, led lawless lives. She's surrounded on all sides by people living lawless lives. So she gets the opportunity to work with her father and to try to make a living, provide for her children. She gives in.

Mr. Sandick in his presentation cited some Circuit Court authority. I would respectfully refer the Court to the *Gaviria* case, I'm probably mispronouncing that, it's in the Eastern District, and that case the Court explained that women reared in traditional Latin cultures are likely to be subjected to male domination that often includes physical abuse. The defendant in the *Gaviria* case led a

life that was an extraordinary trial of physical and emotional abuse and coercion. Her life is a classic example of the plight of a subservient, abused woman.

Now, it is true that under sentencing guidelines Section 5K2.12, that ordinarily some physical abuse or some threat of physical harm needs to be made. But in the *Gaviria* case, the Court described that there are three different types of compulsion. One of them is the basis upon which we submit that your Honor should downwardly depart and sentence Ms. Fernandez to a sentence of 120 months that we believe to be reasonable in this case. That ground is on the ground of subservience. If the defendant follows the commands of another because of a pattern of physical and psychological domination that was developed over time, a downward departure from the United States Sentencing Guidelines is warranted when a woman's status as a victim of systematic physical and emotional abuse substantially lessens her blameworthiness, notwithstanding her legal guilt, and therefore is entitled to departure under 5K2.12 or as also noted by the Court in *Gaviria*, the factors explained in 3553(a)(1).

Those are the grounds upon which we feel this Court can downwardly depart. And we're only talking about two points here, your Honor, starting with, as your Honor described, that your Honor is inclined to sentence Ms. Fernandez at level 34. We submit two levels lower to level 32.

I'll move on now to the next point. I feel I've discussed the childhood circumstances as well. If you have any questions, I'll obviously address them.

I think the next point was under 3553(a), the government submits that Ms. Fernandez has not shown sufficient respect for the law, and that a sentence at level 34 is appropriate for deterrence, rehabilitation and the other

factors outlined in 3553(a). I've read about Ms. Fernandez's history at the prior institutions. I've read the trial transcripts here before your Honor. I've read the hearings in which Mr. Cooper represented Mayra Fernandez. As you can see, she has new counsel now.

In the last year to year-and-a-half she's been moved away from the MDC and MCC and she's now at Valhalla. While in that current institution she has not had the type of disciplinary problems that she experienced at her prior institutions, nor does the government submit she currently has those disciplinary problems. While in her current institution she is enrolled in living skills classes, including computer skills, crochet, nutrition, skills to not only help her become a productive member of society upon release, but more importantly, for her to become a loving and respected mother to her three children that need her.

Now, we're not arguing that your Honor should downwardly depart based upon postconviction rehabilitation. That's not on the table. But we do submit respectfully that since she's been at her current institution, Ms. Fernandez has sought to improve herself and has sought to stay away from those problems which she experienced at other institutions.

As your Honor will remember, and as is detailed in our submissions, there were death threats at her other institution. If Ms. Fernandez exaggerated her circumstances to the inmates or exaggerated her circumstances to the prison guards, I respectfully submit that it would not be extreme conduct to do so if Ms. Fernandez feared for her life, which she did, and she has admitted as such in this courtroom.

Further demonstrating her respect for the law, Ms. Fernandez did sit down for six proffers with the government. And the government approached Mayra Fer-

nandez about sitting down and cooperating with them, because they did want information from her. And even though she feared for her life and the lives of her children in the Dominican Republic, she agreed. And she did meet with them on six occasions.

This comes into the fourth point now. The government submits that Ms. Fernandez should not be given credit for her proffer sessions with the government because she didn't do the type of activities that a typical cooperator does. I agree. I absolutely agree. We're not asking, though, for a 5K1.1 letter. Two points. Two points is all we're asking for here.

And we submit that in addition to all the original factors I have just described, Ms. Fernandez's cooperation with the government, which they admit was important, although I admit it fell short of what a normal cooperator does, we submit that it shows that she has a newfound respect for the law. And that she has a newfound respect for the process, and that she during her sessions admitted to her conduct for which she was on trial in this courtroom two years ago.

At the same time the government discusses Ms. Fernandez's bizarre and erratic behavior, they argue on the other side of the coin that she's not entitled to a sentence that reflects a consideration of those background factors that led her to behave in a bizarre and erratic manner. I respectfully submit, her childhood circumstances, the life in which she led both in the Dominican Republic and under her father's thumb here in America, would cause a person to not only fear the government and possibly be untrustworthy, but to not be the perfect cooperator. And we've never intimated that we've asked for a 5K1.1 letter.

But we do submit that under 3553(a), a defendant does not need to show the type of cooperation that a normal

cooperator shows. We submit that under 3553(a)(1)—I guess just 3553(a)(1), that her newfound respect for the law and her personal circumstances, combined with those grounds that I have discussed for possible downward departure, militate and ask this Court to sentence her at the low end of level 32 to a sentence of 121 months, or alternatively, pursuant to a guidelines departure, for a nonguideline sentence to a term of 120 months.

I believe those are the points discussed by the government. If there's any questions your Honor has for me—

THE COURT: I don't. Thank you.

MR. MACK: Thank you. We'll refer to our submissions then for any . . .

THE COURT: Thank you.

Ms. Fernandez, please stand. Is there anything that you wish to say to me on your behalf in connection with your sentence?

THE DEFENDANT: Yes, your Honor, I do want to say that I do plead guilty to the cases—

THE COURT: I'm sorry.

THE DEFENDANT: I do want to say that I plead guilty to the charges that the government has charged me with. I admit I helped my father distribute the drugs.

And I am very regretful because I never thought of the circumstances and I never have been in jail before. My children have been the most affected. I have a child who was born with asthma and my daughter is very traumatized now because she has never spent so much time apart from her mother. And my biggest fear is that she may someday commit the same type of crimes I've com-

mitted because she has no one to guide her. She doesn't have her mother to guide her.

This has been to me an example so that I could educate my children better, to teach them that you should not do bad things. I am trying to become a better mother and a better person so that society can see me as such. And for the love of my children, I do ask you to be lenient, but whatever you decide I will accept it today. I recognize my guilt and I am willing to accept it. I'd like to thank you, the prosecution and my attorneys for having been so patient with me. So whatever God wills, I will accept it. Thank you very much, your Honor.

THE COURT: Thank you.

With respect to the offense level determination, I do find that the testimony given by Mr. Hernandez at trial was sufficiently reliable to support the findings that are necessary with respect to the quantities and types of drugs that are relied upon in arriving at an offense level determination here. And therefore, that offense level 34 is appropriate.

One of the letters submitted on behalf of the defendant and found at Exhibit E is a letter from the defendant's mother. She describes the fact that she herself was a single mother of six and that life was difficult as a result of that. There's nothing in this letter that suggests any recognition of the kind of abuse that the defendant has described she experienced, including at the hands of her mother. The mother describes Mayra as a happy, dynamic, sincere and affectionate person, a good daughter with spiritual values. And there are other letters I could read from here, too. It paints a—together they paint a very different picture than the one that the defendant has herself described.

But in any event, unfortunately there are children who undergo difficult childhoods, but Ms. Fernandez was an adult when she made the decisions that she did. And I don't find anything in her childhood circumstances that I can use to be a basis for a departure or that should otherwise under 3553(a) lighten her sentence. And the argument about her nation of birth, I think, again, goes too far. There are many people from her country who have made different choices and who have lived law-abiding lives, including many women.

The impression I got from the trial and from presiding over many appearances here in court in which I've heard from the defendant, is that she is a strong-willed woman. And can be somewhat fierce at times in connection with what she thinks is in her interest. I don't find any basis to believe that the choices she made in storing and distributing drugs were anything other than the choices that she made as an adult about how to live her life, including one in which she was creating an environment for the children that were with her that was far from wholesome. It was not a protective, healthy environment for them. It was one fraught with risk and showing them the worst kind of example of what should happen in a family setting.

All of that said, I don't find a need to sentence the defendant at anything other than the lowest end of the guidelines range here.

I guess I should also address the issue about cooperation. I think it's fair to say that it was fitful. Ms. Fernandez, facing mandatory minimum term of imprisonment and guidelines range above that—I mean, the government was arguing for a guidelines range at level 36, I believe, and the PSR came in with a guidelines range at a level 36—decided it was in her interest to try to cooperate.

But she did not do so in a way that suggests to me that it should be used to lighten her sentence.

I mean, cooperation has many components to it. There is the obvious component of assisting the government in the prosecution of other wrongdoers, but I think that's really only the beginning. Of course there is a significant failure with respect to that component.

But in terms of sentencing, I think cooperation is important because of what light it might shed on the character of a defendant, whether it shows the defendant has recognized the full implications of the choices they made in the past; whether they have decided to make a clean and full break with that and change their life in a significant way. On occasion cooperation really is a reflection of a dramatic change in the person's life. And that resonates in a way, in all the ways that one must consider a sentence, including the likelihood of rehabilitation, the necessity for individual deterrence, the need for additional punishment beyond that already imposed and suffered by a defendant.

And so the fact that Ms. Fernandez was not able ultimately to follow through in a full and complete admission about her criminal activities, was not able to live in an appropriate way within the prison setting, difficult as I'm sure that is, again, undercuts using that brief exploration of what it was like being a cooperator as something that should indicate in this case an alteration to a guideline sentence.

I'm fully aware that I have the power to depart and that I have the duty to determine what a reasonable sentence is and to consider all the factors under 3553(a). And the sentence I am imposing is based on a consideration of all the evidence before me, the history of Ms. Fernandez in my courtroom, what I learned at trial and my consideration of my discretion under the law.

Ms. Fernandez, please stand. I find that the offense level is 34 and the criminal history category is I, leading to a guidelines range of 151 to 188 months.

I impose a term of imprisonment of 151 months to be followed by a term of supervised release of five years with the following special conditions: That you report to the probation office in the district to which you are released within 72 hours of release from custody; that you not commit another federal, state or local crime; that you not illegally possess a controlled substance; that you submit to the regular drug testing program; that you are prohibited from possessing a firearm or a dangerous weapon; that you comply with the standard conditions of supervised release; if deemed necessary by the probation department, to participate in a mental health treatment program approved by the probation department and also a program to address substance abuse, which program will include testing to determine whether you have been using drugs. You'll be required to contribute to the cost of services rendered in an amount to be determined by the probation officer based on the ability to pay or the availability of third-party payment.

You shall comply with the immigration laws and cooperate with the Department of Homeland Security, Bureau of Citizenship and Immigration Services. You shall submit to deportation and shall not unlawfully reenter this country. You shall be supervised by the district of your residence. You shall pay a special assessment of $100.

I've considered whether or not to impose a fine. I decline to impose a fine. I do not find that you have the ability to pay a fine.

I must advise you of your right to appeal. If you are unable to pay the cost of an appeal, you may apply for leave to appeal in forma pauperis. The notice of appeal

must be filed within ten days of the judgment of conviction.

You may be seated.

Counsel, is there any legal reason other than what I've already described that—I should have also put on the record that I had received some time ago, and I know they were provided to counsel through a letter of August 2nd by my courtroom deputy, two letters from the Westchester County Department of Corrections with respect to the defendant's participation in a nutrition class and a computer class.

Counsel, is there any reason not already argued to me why I cannot impose a sentence I've described as stated?

MR. SANDICK: No, your Honor.

MR. MACK: No, your Honor.

THE COURT: I therefore order the sentence I have described on the record to be imposed as stated. I don't believe there are any open counts.

MR. LOHIER: That's correct, your Honor.

THE COURT: Thank you all.

(Adjourned).

MR. MACK: Your Honor, it's my application, the defense requests that the transcript of this proceeding be sealed in light of the confidential information that was discussed throughout.

THE COURT: Your application is denied.

MR. MACK: Thank you.

(Adjourned)

Lance Croffoot-Suede (LC-3725)
Joseph Mack (JM-5128)
Victoria Orlowski (VO-6961)

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8200

Attorneys for Defendant
Mayra Fernandez

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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02 CR 1398 (DLC)

UNITED STATES OF AMERICA,

—v.—

MAYRA FERNANDEZ,

Defendant.

SENTENCING MEMORANDUM ON
BEHALF OF MAYRA FERNANDEZ

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		iii
I.	INTRODUCTION	2
II.	MS. FERNANDEZ'S BACKGROUND	6
	A. Ms. Fernandez's Personal Background	6
	B. Ms. Fernandez's Children	7
	C. Ms. Fernandez's Professional Background	9
	D. Offense Background	9
III.	OVERVIEW OF FEDERAL SENTENCING IN LIGHT OF *BOOKER, CROSBY* AND *FLEMING*	9
IV.	THE APPROPRIATE GUIDELINES SENTENCE IS 121 MONTHS, AT THE LOW END OF OFFENSE LEVEL 32	13
	A. The November 2001 Guidelines Should Be Consulted in Sentencing Ms. Fernandez, as Consultation of the November 2004 Edition of the Guidelines Would Violate the Ex Post Facto Clause	13
	B. The Ecuadorian Shipment Cannot Properly be Considered Relevant Conduct and Its Exclusion from Sentencing Lowers Ms. Fernandez's Offense Level to 34	15

1. The Ecuadorian Shipment is Not Relevant Conduct Under USSG § 1B 1.3(a)(1) 16

2. The Ecuadorian Shipment Does Not Relevant Conduct Under USSG § 1B 1.3(a)(1)..... 19

i. The Ecuadorian Shipment Does Not Demonstrate a Similar "Course of Conduct"..... 20

ii. The Ecuadorian Shipment Does Not Demonstrate a "Common Scheme of Plan" .. 21

C. The Government Has Not Demonstrated by a Preponderance of the Evidence that Ms. Fernandez Conspired to Possess Cocaine, or an Amount of Heroin. Greater Than One Kilogram, and Therefore the Offense Level should be Lowered to Level 32..... 22

V. THE APPROPRIATE GUIDELINES-DEPARTURE AND NON-GUIDELINES SENTENCE IS 120 MONTHS..... 24

A. Reasoned Consideration of Mayra Fernandez's Personal History and Characteristics Results in an Advisory Offense Level of 32 and a Sentence of 121 months..... 24

[FILED UNDER SEAL]

[FILED UNDER SEAL]

TABLE OF AUTHORITIES

CASES

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 10

Scott v. *United States*, 97 Civ. 1633 (MGC), 2000 WL 1051873 (S.D.N.Y. July 28, 2000) 18, 19

United States v. *Bacallao*, 149 F.3d 717 (7th Cir. 1998) 21

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United States v. *Clark*, 8 F.3d 839 (D.C. Cir. 1993)..... 27

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United States v. *Crosby*, No. 03-1675, 2005 WL 240916 (2d Cir. Feb. 2, 2005).....passim

United States v. *Cusack*, 66 F. Supp. 2d 493 (S.D.N.Y. 1999)..... 19

United States v. *Deigert*, 916 F.2d 916 (4th Cir. 1990) 27

United States v. *Fleming*, No. 04-1817-CR,
2005 WL 237200 (2d Cir. Feb. 2, 2005) 12

United States v. *Gaviria*, 804 F. Supp. 476
(E.D.N.Y. 1992)..... 32

United States v. *Guzman*, 236 F.3d 830
(7th Cir. 2001).....26, 28

United States v. *Hahn*, 960 F.2d 903
(9th Cir. 1992).....20, 21

United States v. *Hill*, 79 F.3d 1477
(6th Cir. 1996) 20

United States v. *Jones*, 99 Cr. 338-05,
2003 WL 174312 (S.D.N.Y. Jan. 23, 2003)..... 40

U.S. v. *Jones*, Crim. 04-96-P-H,
2005 WL 121730 (D. Me. Jan. 21, 2005).....41, 43

United States v. *Mateo*, 299 F. Supp. 2d 201
(S.D.N.Y. 2004) 15, 25

United States v. *Maxwell*, 34 F.3d 1006
(11th Cir. 1994)..... 20

United States v. *Miller*, 179 F.3d 961
(5th Cir. 1999) 20

United States v. *Moreno*, 181 F.3d 206
(2d Cir. 1999)..... 24

United States v. *Myers*, No. 3-03-CR-147,
2005 WL 165314 (S.D. Iowa Jan. 26, 2005)..... 25

United States v. *Ochoa-Suarez*, 03 Cr. 747,
2005 WL 287400 (S.D.N.Y. Feb. 7, 2005) 22

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(2d Cir. 2004) 23

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(8th Cir. 1990) 20

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cert. denied, 519 U.S. 1066 (1997) 27

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2000 WL 759779 (S.D.N.Y. June 12, 2000) 28, 31

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(E.D. Wis. Jan. 2005) .....passim

United States v. *Revock*, No. CRIM. 04-105-P-H,
2005 WL 188704 (D. Me. Jan. 28, 2005) 43

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(2d Cir. 1999).....27, 28, 31

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(2d Cir. 1995) 14

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(9th Cir. 1992).....27, 28

United States v. *Rogers*, 972 F.2d 489
(2d Cir. 1992) 34

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(2d Cir. 1993) 21

United States v. *Vela*, 927 F.2d 197 (5th Cir. 1991)... 27

United States v. *Yu*, 954 F.2d 951 (3d Cir. 1992)..... 28

STATUTES

18 U.S.C. § 3553.....passim

18 U.S.C. § 3582(a)..... 39

18 U.S.C. § 3585(b)..... 41

18 U.S.C. § 3624(b)..... 41

18 U.S.C. § 994(d)..... 28

21 U.S.C. § 841.....19, 25, 37

28 U.S.C. § 2255..... 18

Sentencing Reform Act of 1984 ("SRA"), Pub. L. 98-473, Title II, §§ 211-238, 98 Stat. 1987 (1984)..... 10

MISCELLANEOUS

USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Criminal Justice System is Achieving the Goals of Sentencing Reform* (Nov. 2004)..... 43

USSG §§ 1A1.1-8F1.1 (2001)..... 10

USSG § 1B1.3 (2001).....passim

USSG § 1B1.11 (2001)..... 14

USSG § 2D1.1 (2001)..... 20

USSG § 3D1.2(d) (2001) 19

USSG § 5H1.6 (2004)..... 14

USSG § 5H1.10 (2001).....26, 28

USSG § 5K2.0 (2001).....25, 26, 39

USSG § 5K2.12 (2001).....25, 26

USSG § 6A1.3 p.s., cmt. (2004)..... 43

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I. INTRODUCTION

Mayra Fernandez, by her undersigned attorneys, White & Case LLP, respectfully submits this Sentencing Memorandum (the "Memorandum"), and the attached exhibits, to assist the Court in determining her sentence on March 11, 2005.

At the request of the government, a Redacted Indictment was filed during the trial of this matter, charging Mayra Fernandez with one count of conspiracy to distribute and possession with intent to distribute heroin, in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A). *See* Ex. A (copy of the redacted indictment in *United States* v. *Fernandez*, 02 Cr. 1398). Following a jury trial, Ms. Fernandez was convicted on March 7, 2003. *See* Ex. B (copy of the verdict form in *United States* v. *Fernandez*, 02 Cr. 1398). On July 18, 2003, the Probation Department submitted to the Court a Presentence Investigation Report (the "PSR"). *See* Ex. C (copy of the PSR). The PSR calculates Ms. Fernandez's sentence based upon a total offense level of 36 and a Criminal History Category of I, resulting in a guidelines range of 188-235 months. Based upon a consideration of relevant sentencing factors, the PSR recommends that Ms. Fernandez be sentenced to 188 months, at the low end of the guidelines range.

The defense is in agreement with the recommendation of the Probation Department that Ms. Fernandez should be sentenced to the low end of the appropriate advisory guidelines range. However, the sentencing range recommended in the PSR is inappropriate for three reasons: (a) the Probation Department's consultation of the April 30, 2003 edition of the USSG violates the Ex Post Facto Clause; (b) the sentencing calculation includes relevant conduct that does not meet the United States Sentencing Guidelines' test for inclusion of such unproven conduct;

and (c) the sentence was calculated prior to the Supreme Court's decision in *United States* v. *Booker* and the Second Circuit's decision in *United States* v. *Crosby,* and therefore did not properly consider the sentencing factors set forth in 18 U.S.C. § 3553(a).

On January 12, 2005, the Supreme Court held in *United States* v. *Booker* that the United States Sentencing Guidelines (the "USSG" or the "Guidelines") are no longer mandatory, and that sentencing courts should instead use them as an advisory tool. See *United States* v. *Booker,* 125 S. Ct. 738 (Jan. 12, 2005). In *United States* v. *Crosby,* the Second Circuit recognized that all other sentencing factors found in 18 U.S.C. § 3553(a) "acquire[d] renewed significance" because of the Supreme Court's remedy in *Booker. See United States* v. *Crosby,* No. 03-1675, 2005 WL 240916, at *5 (2d Cir. Feb. 2, 2005). As a result, the Second Circuit outlined the three categories of sentence a Court now may impose: (a) a Guidelines sentence within the applicable sentencing range, without accounting for any departure (hereinafter referred to as a "Guidelines sentence"); (b) a Guidelines sentence within permissible departure authority (hereinafter referred to as a "Guidelines-departure sentence"); or (c) a sentence outside of the Guidelines (hereinafter referred to as a "non-Guidelines sentence"). *See Crosby,* 2005 WL 240916, at *7.

The Probation Department has recommended that the Court sentence Ms. Fernandez to the low end of the sentencing range suggested in the PSR. The defense agrees with the recommendation that Ms. Fernandez should be sentenced at the low end of the appropriate advisory guidelines range. The defense submits herein that Ms. Fernandez, pursuant to a Guidelines sentence, should be sentenced in a manner consistent with a total offense level of 32 and a Criminal History Category of I, which

results in an advisory sentencing range of 121 to 151 months.[1] In the alternative, it is respectfully submitted that Ms. Fernandez should be sentenced to a term of 120 months, based upon (1) a Guidelines-departure sentence pursuant to the Court's authority under USSG §§ 5K2.0 and/or 5K2.12, or (2) a non-Guidelines sentence based upon a fulsome consideration of the 18 U.S.C. § 3553(a) factors.

In essence, a large part of the dispute over the proper advisory guidelines range comes down to relevant drug weight. Pursuant to *Crosby*, a sentencing court properly discharges its duty to consider the Guidelines as required by Section 3553(a)[2] through "identification of the arguably applicable [sentencing] ranges." *Crosby*, 2005 WL 240916, at **7,9. This Court has opined that the government's proffered "relevant conduct" does not meet the standard of USSG § 1B1.3, and should therefore be excluded. This exclusion will bring the total drug weight down to advisory guidelines level 34, resulting in a sentencing range of 151-188 months. In addition, it is submitted that the jury verdict only established a weight of heroin equal to an offense level of 32, and the government's evidence at trial did not establish by a preponderance of the evidence any greater weight of heroin or any combination of increased heroin weight and cocaine weight. *See Crosby*, 2005 WL 240916, at *5 ("[t]he applicable Guidelines range is normally to be determined in the same manner as before *Booker/Fan-*

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[1] As set forth in Section IV(A), *infra*, the defense submits that the November 2001 edition of the USSG should be consulted in calculating Ms. Fernandez's sentence. Therefore, all references to the USSG contained herein, unless otherwise indicated, reference the November 2001 edition of the USSG.

[2] All references to sections of the United States Code are to Title 18 unless otherwise noted.

fan."). As a result, it is respectfully submitted that Ms. Fernandez can be given a Guidelines sentence at an offense level of 32, to a term of imprisonment of 121 months.

In the alternative, we submit that as directed by 18 U.S.C. § 3553(a), this Court must "impose a sentence sufficient, but not greater than necessary to comply with the purposes" of sentencing. In this regard, and upon a reasoned consideration of the Court's departure authority under USSG §§ 5K2.0 and 5K2.12, and application of the relevant sentencing factors under § 3553(a), Ms. Fernandez should be sentenced to a term of 120 months, pursuant to a Guidelines

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[3] In light of the sensitive nature of Ms. Fernandez's proffers with the government, the defense has requested in a letter to the Court dated February 9, 2005, that certain pages of this memorandum and the exhibits accompanying those pages be filed under seal. A copy of this letter is attached hereto as Exhibit D.

[FILED UNDER SEAL]

II. MS. FERNANDEZ'S BACKGROUND

Mayra Fernandez has lived a tragic and tortured life, punctuated by periods of suffering, manipulation, and severe abuse. She stands before this Court today a 22 year-old woman who is older than her years suggest. She was beaten as a child, impregnated at thirteen, and coerced to help her father "stash" heroin at nineteen. Ms. Fernandez accepts her conviction in this matter, and recognizes that her actions were illegal. However, in order for this Court to fairly mete out justice in this matter, some of the details of Ms. Fernandez's life must be considered.

A. *Ms. Fernandez's Personal Background*

As documented in the PSR and in several letters from loved ones, Ms. Fernandez had a very difficult childhood in an impoverished region of the Dominican Republic. *See* Ex. C, ¶ 47; *see also* Ex. E (copy of a letter from

Ms. Fernandez's mother, Ana Ramona Paula); Ex. F (copy of a letter from Ms. Fernandez's cousin, Nancy Hernandez Paula).[4] Ms. Fernandez's family members maintain that the mistakes Ms. Fernandez has made were, in part, a result of the lack of support that she received as a child. *See* Ex. H (copy of the letter from Ms. Fernandez's sister, Ybelisse Fernandez Paula).

Ms. Fernandez has been surrounded by criminals her entire life. Her father, Elias Fernandez, was recently sentenced to serve a term of 135 months for conspiring, over a four and one-half year period, to distribute both cocaine and heroin. *See* Ex. I (copy of the January 26, 2004 transcript from *United States* v. *Elias Fernandez*, 02 Cr. 881). Mr. Fernandez's mistress, Maria Irizarry, has been convicted and sentenced for maintaining a premise for the purposes of distributing controlled substances. *See* Ex. J (copy of the August 11, 2003 transcript from *United States* v. *Irizarry*, 02 Cr. 877). Ms. Fernandez recently witnessed her first husband, William Henriquez, whom is also currently incarcerated, murder her then-boyfriend, Jose Ventura. *See* Ex. C, ¶¶ 19, 50. Upon information and belief, Ms. Fernandez's second "husband," Juan Baldera, is also currently incarcerated for narcotics trafficking.

B. *Ms. Fernandez's Children*

Ms. Fernandez is a twenty-two year old single mother of three children: Wismary Henriquez, John Baldera, and Miguel Angel Fernandez. Ms. Fernandez gave birth to

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[4] Almost all of the letters of support written by Ms. Fernandez's family and friends were originally written in Spanish. These letters have been translated into English and copies of the original letters are attached as exhibits, along with the translations. Attached hereto as Exhibit G is the affirmation of Rossana Testino-Burke, attesting to the accuracy of the translations.

her first child, Wismary, via Caesarian section when she was only thirteen years old. Despite the difficulties of being a young mother, Ms. Fernandez's friends and family state that she is both loving and caring. *See* Ex. K (copy of a letter from Ms. Fernandez's friend, Radhames Mendoza); *see also* Ex. E. However, Ms. Fernandez's prolonged absence from her children has been devastating to multiple members of her family.

Prior to her incarceration, Ms. Fernandez struggled financially to provide for both her children and her mother, who is permanently disabled and in poor health. *See* Ex. E. Although she endured extended periods of homelessness and had little money, Mayra used what she had to purchase clothing and food for her children, and medicine for her mother. *See* Ex. C, ¶ 53. Now, due to her incarceration, Ms. Fernandez is unable to provide financially for any of her children, and Ms. Fernandez's family struggles to care for them. *See* Ex. E; *see also* Ex. L (copy of a letter from Ms. Fernandez's friend, Sara Molina Mendoza) (stating that Ms. Fernandez "was the economic support of her family"). This imposition is particularly acute in the case of Miguel Angel, who suffers from respiratory complications.[5]

Ms. Fernandez's children have been separated from one another, and are living without parents.[6] Initially, the children remained in the United States and were being cared for by various members of Ms. Fernandez's fam-

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[5] Miguel Angel was born in the United States, but due to financial difficulties, he has been forced to reside in the Dominican Republic.

[6] William Henriquez, the father of Ms. Fernandez's first child is incarcerated. *See* Ex. M (Tr. of Sept. 9, 2004 sentencing in *United States v. Henriquez*, 03 Cr. 788). Similarly, upon information and belief, Juan Baldera, the father of Ms. Fernandez's second child, is also incarcerated. Ms. Fernandez is unaware of the identity of her third child's father.

ily, including her sister Altagracia Fernandez[7] and "step-sister" Emily Baldera. However, due to financial circumstances, Wismary was sent to the Dominican Republic to be cared for by Ms. Fernandez's mother, Ana Paula, who is ill-equipped to care for her since she is in poor health and lives in poverty. *See* Ex. C at ¶ 48; *see also* Ex. E. Due to the financial hardships associated with raising children, Altagracia, a factory worker who was caring for Miguel Angel, was forced to send him to live with Ms. Fernandez's mother.[8] John is the only one of Ms. Fernandez's children who resides in the United States. John is being cared for by his paternal aunts and grandparents, one of whom is Maria Irizarry, who recently has been convicted and sentenced for maintaining a premise for the purposes of distributing controlled substances. *See* Ex. J.

All of Ms. Fernandez's children miss their mother dearly, and it is reported that some of the children require psychiatric care as a result of their mother's absence. *See* Ex. L. Ms. Fernandez's family members relate that Ms. Fernandez's daughter, Wismary, has been treated for psychological problems due to her mother's absence, which are manifested through problems with her weight, attention distraction, and general, undiagnosable signs of illness. *See* Ex. E. A friend writes that Wismary "spend[s] most of her time asking for her mother; asking why doesn't her mother come back . . . ." *See* Ex. N (copy of a letter from Ms. Femandez's friend, Herminia Garcia). In addition to the trauma suffered by Ms. Fernandez's children, Ms. Fernandez's mother suf-

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[7] This status is reflected in the July 2003 PSR. *See* Ex. C at ¶ 50.

[8] Ms. Fernandez has related that her sister Altagracia has resorted to federal assistance programs, such as WIC, in order to provide for Miguel Angel.

fers physically as a result of her daughter's incarceration. *See* Ex. E (letter from Ana Ramona Paula, describing her medical ailments); *see also* Ex. O (copy of a letter from Ms. Fernandez's friend, Ana Devarez).

C. *Ms. Fernandez's Professional Background*

Ms. Fernandez has very little formal education; she attended primary school only until approximately the eighth grade. Ms. Fernandez discontinued her formal education because her father, Elias, abandoned the family, and she was therefore forced to work at a young age. She has worked as a hairdresser and in the food preparation business in order to support her family. *See* Ex. P (copy of a letter from Ms. Fernandez's friend, Fiordaliza Gil Pichardo). While in prison, Ms. Fernandez has made several efforts to improve her ability to provide for both herself and her family. She is successfully participating in classes in computer skills, nutrition, and crochet. *See* Ex. Q (copy of a letter from Ms. Fernandez's BOCES instructor, Tony Howard); Ex. R (copy of a letter from Ms. Fernandez's nutrition instructor, Julia M. Robinson); Ex. S (copy of Ms. Fernandez's certification acknowledging her participation in crochet classes). Upon information and belief, Ms. Fernandez is also taking hairdressing classes and learning to improve upon those skills that she first learned in the Dominican Republic.

D. *Offense Background*

On March 7, 2003, Ms. Fernandez was found guilty of conspiring to distribute and possessing with the intent to distribute heroin. The jury verdict indicated that the conspiracy involved one kilogram or more of heroin. *See* Ex. B.

III. OVERVIEW OF FEDERAL SENTENCING IN LIGHT OF *BOOKER, CROSBY* AND *FLEMING*

On January 12, 2005, the Supreme Court declared unconstitutional all mandatory applications of the United States Sentencing Guidelines. *See Booker,* 125 S. Ct. at 741-42, *consolidated with United States* v. *Fanfan,* No. 04-105. The Sentencing Reform Act of 1984 established the United States Sentencing Commission to promulgate guidelines to be used in criminal sentencing. *See* Sentencing Reform Act of 1984 ("SRA"), Pub. L. 98-473, Title II, §§ 211-238, 98 Stat. 1987 (1984); *see also* USSG §§ 1AI.1-8F1.1 Since 1987, those Guidelines were binding on all federal judges. *See* 18 U.S.C. § 3553(b)(1). Until *Booker,* the Guidelines required judges to sentence a defendant based, in part, on allegations never presented to a jury or proven beyond a reasonable doubt. Such allegations were essential to the punishment received by the defendant because the sentence could not have been imposed without them. *See Booker,* 125 S. Ct. at 751. In two majority opinions, each authored by a different composite of Justices, the Supreme Court in *Booker* held (i) that mandatory application of the Guidelines violated the Sixth Amendment right to jury trial and the holdings in *Apprendi* v. *New Jersey,* 530 U.S. 466 (2000) and its progeny; and (ii) that section 3553(b)(1) (making the Guidelines mandatory) and section 3752(e) (containing critical cross-references to section 3553(b)(1)) must be excised from the remainder of the SRA. *See Booker,* 125 S. Ct. at 748, 751, 755-56. Consequently, judges must now consider all of the

other factors enumerated in section 3553(a)[9] to impose a sentence, rather than limiting itself to the sentencing

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[9] In relevant part, these factors include:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and (ii) that . . . are in effect on the date the defendant is sentenced; or (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code; . . .

(5) any pertinent policy statement (a) issued by the Sentencing Commission pursuant to section 994 (a)(2) of title 28, United States Code . . . that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

range advised by the USSG. *See Id.* at 763. Finally, *Booker* states that sentences imposed in this manner must be reasonable or risk reversal on appeal. *See Id.* at 762.

On February 2, 2005, the Second Circuit began the process of implementing *Booker* by issuing two decisions—*Unites States* v. *Crosby* and *United States* v. *Fleming*. In *Crosby*, the Second Circuit clearly indicated that the section 3553(a) factors formerly overshadowed by the Guidelines "acquire[d] new significance" after *Booker* and must be considered alongside the Guidelines. *Crosby*, 2005 WL 240916, at *5 ("Prior to *Booker/Fanfan*, . . . all of the factors enumerated in [§ 3553(a)] had uncertain import . . . Now . . . the duty imposed by section 3553(a) to 'consider' numerous factors acquires renewed significance.").[10] After analyzing *Booker*, the Second Circuit determined that sentencing judges must consider the Guidelines and, after consideration of the other section 3553(a) factors, decide whether to impose a sentence within the range advised by the Guidelines or to impose a non-Guidelines sentence. *See id.* at **5-7. *Crosby* clarified that a sentence based upon a departure "imposed pursuant to the departure provisions of the policy statements in the Guidelines" was still a Guidelines sentence. *See id.* at *5 n.9. The Second Circuit held that a sentencing judge properly discharged its duty under section 3553(a)(4) by considering all arguably applicable Guideline ranges[11] determined "in the same manner as before *Booker/Fanfan*." *Id.* at *5.

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[10] On no less than five occasions, *Crosby* reiterated the requirement to consider all section 3553(a) factors. *See Crosby*, 2005 WL 240916, at **5,7,9.

[11] The duty to consider the Guidelines becomes more relaxed in the absence of an applicable Guideline range. Such was the case in *United States* v. *Fleming* where the defendant appealed a sentence

The Second Circuit emphasized that the process by which a judge selected a sentence largely determined upon the reasonableness of that sentence regardless of its length. *See id.* at *8. *Crosby* declined to accept the government's argument that even in an advisory capacity "any sentence . . . less than [the Guideline range minimum] would have been unreasonable and subject to reversal on appeal . . . ." *Id.* at *13. Instead, the Court emphasized that reasonableness is a flexible concept "generally lacking precise boundaries." *Id.* at *9 (noting that *per se* rules as to the reasonableness or unreasonableness of sentences based on whether they fell within the Guidelines "effectively re-institute mandatory adherence to the Guidelines"). *Crosby* highlighted the value of such flexibility. As the Court put it:

> [T]he Supreme Court expects sentencing judges faithfully to discharge their statutory obligation to "consider" the Guidelines *and all of the other factors listed in section 3553(a).* We have every confidence . . . that the resulting sentences will continue to substantially reduce unwarranted disparities *while now achieving somewhat more individualized justice.*

Id. at *7 (emphasis added). Indeed, as explained more fully in Section V(D), *infra,* reducing unwarranted sen-

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imposed for violating the terms of a supervised release. *See Fleming,* No. 04-1817-CR, 2005 WL 237200 (2d Cir. Feb. 2, 2005). There, the court affirmed the sentence because the record clearly indicated that the sentencing judge was well aware of the range recommended in the Commission's policy statement. *See id.* at **3-4 ("Here the sentencing judge, functioning under a sentencing regime that, even before *Booker/Fanfan,* was advisory with respect to revocation of supervised release, knew that she was not bound by the policy statements and chose to exercise her discretion.").

tencing disparities between Ms. Fernandez and the other participants who have already been sentenced in connection with the activities underlying her conviction provides a compelling reason for imposing the sentence requested herein.

IV. THE APPROPRIATE GUILDELINES SENTENCE IS A SENTENCE OF 121 MONTHS, AT THE LOW END OF OFFENSE LEVEL 32

As explained in *Booker* and in Section III, *supra*, 18 U.S.C. § 3553(a) sets forth those factors which the Court must consider in determining the particular sentence to be imposed. This section provides a partial analysis of the sentencing considerations in 18 U.S.C. § 3553(a)(1), which directs that sentencing courts consider the nature and circumstances of the offense. In addition, the facts asserted throughout this section will necessarily inform this Court with regard to 18 U.S.C. § 3553(a)(4), the sentencing range established for the defendant's conduct.

As demonstrated below, the Probation Department has incorrectly calculated Ms. Fernandez's offense level at Level 36. The defense disagrees with the calculation contained in the PSR because the Probation Department: (1) did not use the correct version of the Guidelines in calculating Ms. Fernandez's sentence; (2) improperly included outdated and unproven conduct in its sentencing calculation; and (3) did not properly account for the sentencing factors contained in 18 U.S.C. § 3553(a).

A. *The November 2001 Guidelines Should Be Consulted in Sentencing Ms. Fernandez, as Consultation of the November 2004 Edition of the Guidelines Would Violate the Ex Post Facto Clause*

Although the guidelines are no longer mandatory, sentencing courts have been directed to consult the Guidelines when imposing sentences. *See* discussion of *Booker, supra* Section III; see *also Crosby,* 2005 WL 240916, at **5,7,9; *United States* v. *Ranum,* No. 04-CR-31, slip op. at 1-2, 4 (E.D. Wis. Jan. 2005) (attached hereto as Ex. T). Counsel for Ms. Fernandez respectfully submits that, in conducting its guidelines analysis pursuant to 18 U.S.C. § 3553(a)(4), the Court should consult the Guidelines in effect at the time of Ms. Fernandez's offense of conviction, *i.e.*, the November 2001 edition of the Guidelines. Reference to the Guidelines in effect at the time of sentencing[12] (i.e., the November 2004 edition of the Guidelines Manual) would violate the Ex Post Facto clause of the Constitution, because application of the November 2004 Guidelines Manual would result in a more severe advisory sentence structure than consultation of the version in effect at the time of the offense of conviction. *See* USSG § 1B1.11; *United States* v. *Rivers,* 50 F.3d 1126, 1129 (2d Cir. 1995); Ex. T at 9 n.7 *(Ranum)* (determining defendant's offense level under the 2000 version of the Guidelines rather than the 2004 version, because even

[12] The PSR calculates Ms. Fernandez's sentence using the April 30, 2003 edition of the Guidelines, presumably because that was the edition in effect at the time of the original sentencing date in this matter—July 25, 2003. For the reasons stated herein, the Ex Post Facto clause is violated regardless of whether the April 30, 2003 edition or the November 2004 edition of the USSG is applied in this case.

though the guidelines are no longer mandatory and it is therefore unclear whether the Ex Post Facto Clause still applies, *Booker* did not instruct district courts to apply the Guidelines, including § 1B1.11, any differently than was the practice before *Booker*).

The calculations of Ms. Fernandez's criminal history and offense level for the heroin weight recommended by the November 2004 and the November 2001 editions of the Guidelines appear to be similar. However, the Sentencing Commission's emergency revised guidelines, effective October 27, 2003 and incorporated in the November 2004 edition of the Guidelines, suggest a more severe sentence for Ms. Fernandez in at least two ways.

First, the November 2004 Guidelines contain added application notes that restrict family circumstances departures by establishing heightened criteria for departures based on the loss of caretaking or financial support. See USSG § 5H1.6 (2004). The defense argues that the Court should take account of Ms. Fernandez's family circumstances in imposing a sentence upon her.

Second, newly-enacted Section 5K2.0(c) of the Guidelines attempts to restrict the Court from combining "considered" and "unconsidered" factors in awarding a downward departure based on multiple circumstances. As described below in Section V, the defense urges the Court to consider and account for a number of factors in calculating Ms. Fernandez's sentence, including, *inter alia* Ms. Fernandez's family circumstances and the exceptional childhood abuse that she suffered.

Neither of the aforementioned revisions to the Guidelines are mere clarifying amendments; rather, these revisions recommend heightened criteria for the enumerated departures. For this reason, consideration of the November 2004 edition of the Guidelines may result in a more

severe sentence for Ms. Fernandez, and thereby violates the Ex Post Facto clause. *See United States* v. *Mateo*, 299 F. Supp. 2d 201, 205 (S.D.N.Y. 2004) (applying the 2001 USSG because the PROTECT Act amendments prohibit certain multiple circumstances departures and restricts the court's ability to downwardly depart based upon family circumstances); Ex. T at 9 n.7 *(Ranum)* (determining defendant's offense level under the 2000 version of the Guidelines to avoid violating the Ex Post Facto Clause). For these reasons, it is therefore appropriate for the Court to consult the November 2001 edition of the Guidelines in calculating Ms. Fernandez's sentence.

B. *The Ecuadorian Shipment Cannot Properly be Considered Relevant Conduct and Its Exclusion from Sentencing Lowers Ms. Fernandez's Offense Level to 34*

Ms. Fernandez was convicted of conspiring to distribute and possessing with the intent to distribute one kilogram and more of heroin. The relevant indictment at trial alleged that Ms. Fernandez participated in a conspiracy from the Fall 2001 until May 2002. *See* Ex. A. Prior to trial, the government notified the Court of its intention to introduce evidence at trial that in August 1999, a two kilogram[13] package of heroin was scheduled to be sent from Ecuador to the Bronx (hereinafter, this package shall be referred to as the "Ecuadorian Shipment"). *See* Ex. C, ¶ 23; Ex. V (copy of the March 3, 2003 transcript in *United States* v. *Fernandez*, 02 Cr.

[13] The PSR states that the Ecuadorian Shipment contained two kilograms of heroin, but the original indictment in this matter states that the Ecuadorian Shipment contained approximately 1.5 kilograms of heroin. *Compare* Ex. U (copy of the original indictment in *United States* v. *Fernandez*, 02 Cr. 1398) *with* Ex. C, ¶ 23.

1398). The package, which never left Ecuador, was addressed to the care of Augustin Marrero. *See* Ex. C, ¶ 23. The address provided for Mr. Marrero was a vacated apartment in the building in which Ms. Fernandez lived, and the contact information on the package listed a disconnected telephone number that at one time belonged to Ms. Fernandez. *See* Ex. V. The Court excluded the evidence.[14] *See* Ex. V.

Post-conviction, the government gave notice that they would be seeking to introduce evidence of the Ecuadorian Shipment as relevant conduct at Ms. Fernandez's sentencing. At the government's request, the Probation Department included this information in its July 18, 2003 calculation of Ms. Fernandez's offense level.[15] *See* Ex. C, ¶ 23. The defense urges that this Court should continue to apply the same relevant conduct analysis that applied prior to the Supreme Court decision in *Booker*. *See Crosby*, 2005 WL 240916, at *5. For the reasons stated herein, the Ecuadorian shipment is not relevant conduct, and should not be included in a calculation of Ms. Fernandez's offense level. Exclusion of the two kilograms of heroin contained in the Ecuadorian Shipment

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[14] The original indictment in this matter charged that the conspiracy occurred from at least August 1999 to at least May 2002, and one of the overt acts to further the conspiracy was the Ecuadorian Shipment. *See* Ex. U. During trial, the government filed the indictment upon which Ms. Fernandez was convicted; the new indictment excluded any reference of the Ecuadorian Shipment. *See* Ex. A.

[15] Ms. Fernandez's undersigned counsel has specifically objected to the inclusion of the Ecuadorian shipment in the calculation of Ms. Fernandez's offense level calculation. *See* Ex. W, (Dec. 13, 2004 letter from Joseph Mack to Claude Jean-Baptiste). As of the date of this submission, the Probation Office has not yet revised the PSR.

decreases the total drug weight to an advisory offense level of 34.

1. *The Ecuadorian Shipment is Not Relevant Conduct Under USSG § 1B1.3(a)(1)*

On October 14, 2003, the Court performed a relevant conduct analysis and opined at that time that the Ecuadorian Shipment was not relevant conduct, and therefore, Ms. Fernandez's offense level would be 34 and her resultant sentencing guidelines range would be 151 to 188 months.[16] *See* Ex. X at 12 (copy of the October 14, 2003 transcript in *United States* v. *Fernandez*, 02 Cr. 1398). The Court's October 14, 2003 reasoning is persuasive and should be adhered to in sentencing Ms. Fernandez.

Pursuant to the guidance provided in USSG § 1B1.3(a)(1), there are essentially three issues to consider in calculating Ms. Fernandez's base offense level: her acts and omissions; those acts and omissions which she aided and abetted; and those acts and omissions that were reasonably foreseeable—provided that each of these acts and omissions occurred "during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." USSG § 1B1.3(a)(1)(B).

The Court has previously reasoned that the Ecuadorian Shipment "was not something that occurred during the commission of the offense of conviction. And I don't believe it is something that occurred in preparation for that offense." *See* Ex. X at 12. As explained above, the Ecuadorian shipment was allegedly attempted in August of 1999, well over two years before Ms. Fernandez

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[16] The PSR concludes that Ms. Fernandez is in Criminal History Category I, and the defense agrees with this analysis.

joined the conspiracy. A thorough review of the trial transcript[17] does not reveal a word spoken about Ms. Fernandez's alleged involvement in the conspiracy prior to the fall of 2001. In fact, no trial witness encountered Ms. Fernandez until April 2002. *See* Ex. Y (copy of pp. 64-65 of the March 4, 2003 trial transcript from *United States* v. *Fernandez*, 02 Cr. 1398).

In addition to the foregoing, Ms. Fernandez's father, Elias Fernandez, has pleaded guilty to conspiring to distribute and possessing with the intent to distribute five kilograms and more of substances containing a detectable amount of cocaine, and one kilogram and more of substances containing a detectable amount of heroin. *See* Ex. Z (copy of the superseding information in *United States* v. *Elias Fernandez*, 02 Cr. 881); Ex. I (copy of the January 26, 2004 sentencing transcript in *United States* v. *Elias Fernandez*, 02 Cr. 881). Mr. Fernandez pled guilty to participating in a conspiracy that existed from in or out early 1998, up to and including June 2002, which encompasses the time period of the Ecuadorian shipment. *See* Ex. Z. As explained M the Sentencing Guidelines, the relevant conduct of a defendant like Ms. Fernandez "does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct." U.S.S.G. § 1B1.3, comment. (n.2) (2001).

On its facts, the instant case draws a close parallel to the factual scenario in *Scott* v. *United States*, 97 Civ. 1633, 2000 WL 1051873, (S.D.N.Y. July 28, 2000). After conviction at a jury trial, the defendant in *Scott* was sentenced on three counts, including conspiracy to

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[17] As the Court is aware, the undersigned counsel were not the attorneys of record for the trial phase of this matter, and therefore historical references to the trial are based primarily upon a review of the relevant trial transcripts.

distribute more than five kilograms of cocaine. *See id.* at *1. The evidence at trial showed three instances of the defendant's membership in the conspiracy, and the earliest instance was on September 13, 1989. *See id.* at *2. At sentencing, however, the district court held the defendant responsible for drugs sold by his co-conspirators prior to September 13, 1989. *See id.* After the defendant made a motion to vacate his sentence under 28 U.S.C. § 2255, the district court held that the evidence at trial failed to establish the defendant was a member of the conspiracy prior to September 13, 1989, and that the trial evidence failed to provide any basis to conclude that the defendant knew or reasonably should have known the quantity of drugs sold as part of the conspiracy prior to September 13, 1989. *See id.* at *3.

In the instant case, the government failed to produce a scintilla of evidence that Ms. Fernandez was involved in her father's heroin conspiracy prior to the fall of 2001, or had any reason to know the quantity of drugs sold as part of the pre-existing conspiracy. It defies common sense to include within Ms. Fernandez's advisory offense level calculation liability for a shipment of heroin attempted over two years before her involvement in the offense of conviction. *See United States* v. *Cusack*, 66 F. Supp. 2d 493, 503 (S.D.N.Y. 1999) (holding that conduct occurring between three and five years before the commission of the offense was neither committed during nor in preparation for the offense). As stated by the court in *Scott*, to sentence Ms. Fernandez "based on conduct for which [s]he bears no legal responsibility is manifestly unjust." *See Scott*, 2000 WL 1051873, at *3.

In short, the alleged Ecuadorian Shipment occurred at a temporally disconnected time from the offense of conviction, and therefore could not have occurred in preparation for, or during the commission of the offense.

Furthermore, it cannot be argued credibly that the Ecuadorian Shipment was an attempt on the part of Ms. Fernandez to avoid detection or responsibility. For the foregoing reasons, the Ecuadorian Shipment is not relevant conduct under USSG § 1B1.3(a)(1) and therefore must be excluded from the calculation of Ms. Fernandez's offense level.

2. *The Ecuadorian Shipment is Not Relevant Conduct Under USSG § 1B1.3(a)(2)*

The relevant conduct analysis under USSG § 1B1.3(a)(2)[18] is equally unavailing to the government's position. In order to demonstrate that the Ecuadorian Shipment is relevant conduct under USSG § 1B1.3(a)(2), the government must demonstrate that the Ecuadorian Shipment was "part of the same course of conduct or scheme or plan as the offense of conviction." USSG § 1B1.3(a)(2).

i. *The Ecuadorian Shipment Does Not Demonstrate a Similar "Course of Conduct"*

There are two concepts within the USSG § 1B1.3(a)(2) analysis: the first entails an analysis of whether a particular defendant has been engaged in the same "course of conduct." This analysis turns upon a determination of the similarity, regularity, and temporal proximity

[18] This subsection of the statute applies only to those offenses for which USSG § 3D1.2(d) would require grouping of multiple counts of conviction. *See* USSG § 1B1.3(a)(2). The Sentencing Guidelines make clear that a conviction under 21 U.S.C. § 841 (as in this case) makes § 1B1.3(a)(2) applicable, even though Ms. Fernandez was not convicted on multiple counts. *See* USSG § 3D1.2(d); USSG § 1B1.3, cmt. n.3.

between the various acts. USSG § 2D1.1, cmt. (n.3). As in the instant case, where the conduct alleged to be relevant conduct is temporally remote to the offense of conviction, "a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity." USSG § 1B1.3, cmt. (9(B)). Several United States Courts of Appeal are in agreement that significant time intervals between alleged acts require a stronger showing of similarity and regularity. *See United States* v. *Miller*, 179 F.3d 961, 966-67 (5th Cir. 1999) (21 months); *United States* v. *Hill*, 79 F.3d 1477, 1480-85 (6th Cir. 1996) (more than a year); *United States* v. *Coffman*, 94 F.3d 330, 336-37 (7th Cir. 1996) (two years); *United States* v. *Maxwell*, 34 F.3d 1006, 1010-11 (11th Cir. 1994) (more than a year); *United States* v. *Hahn*, 960 F.2d 903, 911 (9th Cir. 1992) (five months); *United States* v. *Phillippi*, 911 F.2d 149, 151 (8th Cir. 1990) (two years). For the reasons set forth above *supra*, the government is unable to make such a showing in this case.

When the relevance of the conduct depends primarily on the similarity of events, the Court must consider whether "specific similarities exist between the offense of conviction and the temporally remote conduct." *Hahn*, 960 F.2d at 911 (holding that remand for re-sentencing was required to determine whether acts which occurred over five months prior to offense conduct were relevant conduct). The government has put forth no evidence of any other heroin shipments that have any palpable connection to Ms. Fernandez and the conduct that formed the basis of her conviction.

In conducting a relevant conduct analysis based primarily upon the regularity of the events, "*specific repeated events*" outside the offense of conviction must be identified. *See id.* (emphasis in original). In the

instant case, there was a single alleged attempt to ship heroin from Ecuador—in such a situation, "[r]egularity is wanting in the case of a solitary, temporally remote event . . . ." *Id.*

In light of the unique circumstances of the Ecuadorian Shipment, combined with the lack of temporal and geographical proximity between the Ecuadorian Shipment and the conduct that formed the basis for Ms. Fernandez's conviction, the Ecuadorian Shipment cannot be considered to be part of a "course of conduct." *See United States* v. *Booker*, 334 F.3d 406, 414 (5th Cir. 2003) (holding that marijuana found 500 miles away and over nine months temporally removed from the conspiracy was not relevant conduct); *United States* v. *Bacallao*, 149 F.3d 717, 720-22 (7th Cir. 1998) (holding that cocaine purchase was not relevant conduct when it occurred more than a year and a half before the defendant's arrest, and no geographic proximity was demonstrated).

ii. *The Ecuadorian Shipment Does Not Demonstrate a "Common Scheme or Plan"*

The second prong of the analysis under USSG § 1B1.3(a)(2) is whether or not the Ecuadorian Shipment was part of a "common scheme or plan." For two offenses to constitute part of a common scheme or plan, "they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi." USSG § 1B1.3(a)(2), cmt. n.9. The burden is on the government to demonstrate that there was a connection among participants and occasions. *See United States* v. *Shonubi*, 998 F.2d 84, 89 (2d Cir. 1993). No such argument has been or can be made here, as there is

no connection, substantial or otherwise, between the Ecuadorian Shipment and the conduct that formed the basis for Ms. Fernandez's conviction.

For the foregoing reasons, the Ecuadorian Shipment cannot be considered relevant conduct, and therefore should not be included in the calculation of Ms. Fernandez's advisory offense level. As a result, Ms. Fernandez's advisory offense level should be lowered to level 34.

C. *The Government Has Not Demonstrated by a Preponderance of the Evidence that Ms. Fernandez Conspired to Possess Cocaine, or an Amount of Heroin Greater Than One Kilogram, and Therefore the Offense Level Should be Lowered to Level 32*

Based upon consideration of only the jury verdict and the evidence presented at trial, Ms. Fernandez's offense level should be further decreased from level 34 to level 32. There are two reasons for this conclusion. First, the jury made no finding that Ms. Fernandez conspired to distribute cocaine nor did the jury find beyond a reasonable doubt that Ms. Fernandez conspired to distribute a specific weight of heroin, beyond the one kilogram reflected in the verdict. *See United States* v. *Ochoa-Suarez*, 03 Cr. 747, 2005 WL 287400, at *2 (S.D.N.Y. Feb. 7, 2005) (holding that sentencing enhancement for managerial role could not be applied to defendant post-*Booker* because "there has been no finding beyond a reasonable doubt by a jury to this effect.") Second, it was not established by a preponderance of the evidence that Ms. Fernandez conspired to distribute an amount of heroin in excess of the one kilogram amount reflected in the jury verdict.

Prior to the case going to the jury, the government chose to submit a special verdict form. In the event the jury found Ms. Fernandez guilty of the conspiracy alleged in the one-count indictment, the government asked the jury on the special verdict form to determine whether the conspiracy involved one kilogram and more of heroin. *See* Ex. B (verdict form). There was no place on the special verdict form to indicate a verdict based upon a quantity of cocaine. In light of the government's argument that Ms. Fernandez's offense level should be calculated based upon 4.1 kilograms of heroin and 30 kilograms of cocaine, the special verdict form is conspicuously silent on these quantities. As the Court is well aware, special verdict forms are often used in order to ensure a conviction based upon conspiracies involving multiple narcotics and drug weights well in excess of one kilogram.[19] *See, e.g., United States* v. *Penaranda*, 375 F.3d 238, 240 (2d Cir. 2004) (defendant was convicted after a jury trial of one count of conspiracy to distribute one kilogram and more of a substance containing heroin and five kilograms and more of a substance containing cocaine).

As a result of a failure of the jury verdict form to specify a particular amount of heroin in excess of one kilogram and the complete failure to mention cocaine, it is submitted that the cocaine weight (30 kilograms) and the heroin weight in excess of one kilogram (3.1 kilograms) must therefore be excluded from the calculation of Ms. Fernandez's offense level. Accordingly, the

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[19] As explained above, Ms. Fernandez's father, Elias Fernandez, has pleaded guilty to conspiring to distribute and possessing with intent to distribute five kilograms and more of substances containing a detectable amount of cocaine, and one kilogram and more of substances containing a detectable amount of heroin. *See* Ex. Z and Ex. I at 5:8-13.

exclusion of these amounts results in an advisory offense level of 32.

In addition to the lack of a special verdict form, there is insufficient evidence upon which the Court can find that Ms. Fernandez conspired to distribute and possessed with the intent to distribute any amount of cocaine, or any amount of heroin greater than one kilogram. The government called a single witness, Joaquin Hernandez, to testify about the alleged heroin weight that Ms. Fernandez conspired to distribute. It is the government's burden to prove the

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potential factors that may warrant departure and granting a nine-level departure in a drug-related case, based upon a combination of factors, and alternatively upon extreme family circumstances and presentence confinement circumstances); *see also* USSG § 5K2.0(c) (permitting departures based upon multiple circumstances).

1. *Cultural Factors of Physical and Sexual Abuse Suffered by Ms. Fernandez*

The defense urges the Court to consider the arguments herein as part of both a Guidelines and a non-Guidelines analysis, both of which can result in imposing a sentence of 120 months in this case. Pursuant to a Guidelines analysis, the Court may issue a Guidelines-departure sentence of 120 months based upon a finding that the facts in this section provide reason to depart from the otherwise applicable Guidelines range, pursuant to USSG § 5K2.0 and 5K2.12. In the alternative, upon consideration of Ms. Fernandez's personal history and characteristics pursuant to 18 U.S.C. § 3553(a)(1), the Court may issue a non-Guidelines sentence of 120 months.

Consideration of cultural heritage is proper when a defendant's offense conduct was strongly influenced by her culturally-acquired behavioral characteristics. *See Guzman*, 236 F.3d 830, 837-38 (7th Cir. 2001) (Ripple, J., dissenting). Even where "cultural heritage" was formerly rejected as a basis for departure, courts conceded that it could "play a causal role in relation to other departure factors." *See id.*, 236 F.3d at 833 (finding that the lower court abused its discretion under the Sentencing Guidelines by granting a downward departure based upon the dictates of Mexican cultural norms,

which lead the defendant to submit to her boyfriend's will); *see also* USSG § 5H1.10.

Ms. Fernandez's cultural heritage played a definitive "causal role" in relation to the extreme abuse that she has suffered, which is described more fully below. The United States Department of State has recognized that women in the Dominican Republic traditionally "have not enjoyed equal social and economic status or opportunity with men." *See United States Department of State, Country Reports on Human Rights Practices 2003* (Dominican Republic) at 13, (Feb. 25, 2004), *available* at *http://www.state.gov/g/drl/rls/hrrpt/2003/27895.htm.* Men hold the majority of leadership positions in all sectors of the Dominican Republic. *See id.* Domestic violence and rape are endemic, and rape often goes unreported, "because of fear of social stigma." *Id.* at 12-13. Further, the United Nations Commission on Human Rights has noted that "the husband is the head of the household according to civil law" in the Dominican Republic.[23] *See Integration of the Human Rights of Women and the Gender Perspective—Violence Against Women,* U.N. ESCOR, 58th Sess., U.N. Doc. E/CN/4/2002/83 at ¶ 62 (2002).

During her childhood years in the Dominican Republic, Ms. Fernandez was regularly beaten and tortured by members of her family.[24] This extreme physical abuse

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[23] Ms. Femandez's mother expressed this sentiment in her letter to the court, stating that the life of a single mother is very difficult because males are considered the head of the household. *See* Ex. E.

[24] Due to the social conditions of Ms. Fernandez's upbringing, as elucidated in the State Department and United Nations reports, Ms. Fernandez had nowhere to turn to escape the conditions to which she was subjected. *See* Ex. BB (copy of the Department of State Country Reports on Human Rights Practices—2003) at 13-14; Ex. CC at ¶ 62 (copy of the *Integration of the Human Rights of Women and the Gender Perspective*

served to shatter her chances for a normal childhood and permanently cripple her ability to adhere to social norms. It is submitted herein that the physical abuse that Ms. Fernandez suffered, combined with the mental abuses her loved ones inflicted upon her, are significant factors in her submission to the will of her father, and thereby becoming involved in his criminal activities. *See* Ex. I.

The Second Circuit held that it is proper for sentencing courts to depart, pursuant to USSG § 5K2.0 on the basis of a defendant's history of extreme childhood abuse.[25] *See, e.g., United States* v. *Rivera,* 192 F.3d 81 (2d Cir. 1999); *see also United States* v. *Ramirez,* No. 98 Cr. 927, 2000 WL 759779, at *1 (S.D.N.Y. June 12, 2000) (granting a departure where defendant's mother was incarcerated, defendant's stepfather hung himself, and defendant witnessed his stepfather frequently handcuff and beat his mother and forced her to work as a prostitute, and the defendant himself was beaten with a belt soaked in alcohol); *United States* v. *Brady,* No. 02 CR 1043, 2004 WL 86414, at *8 (E.D.N.Y. Jan. 20, 2004) (granting a downward departure based upon the abuse the defendant suffered as a child, which included being burned, severely beaten, and forced to eat cat food). Under the Guidelines regime, departures based

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—*Violence Against Women)* (citing the social conditions and the commonplace abuse of children that occurs in the Dominican Republic).

[25] Other Courts of Appeal, including the Seventh, Fourth, Ninth and the D.C. Circuit, also recognize this basis for downward departure. *See United States* v. *Rivera,* 192 F.3d 81, 84-85 (2d Cir. 1999) (citing *United States* v. *Pullen,* 89 F.3d 368, 372 (7th Cir 1996), *cert denied,* 519 U.S. 1066 (1997); *United States* v. *Clark,* 8 F.3d 839, 845-46 (D.C. Cir. 1993); *United States* v. *Roe,* 976 F.2d 1216, 1218 (9th Cir. 1992); *United States* v. *Vela,* 927 F.2d 197, 199 (5th Cir. 1991); *United States* v. *Deigert,* 916 F.2d 916, 919 (4th Cir. 1990)).

upon the abuse the defendant suffered were required to rise to a level so extraordinary that it could be assumed to cause mental or emotional pathology. *See Rivera,* 192 F. 3d at 86; *Brady,* 2004 WL 86414, at *8 (granting a downward departure where the court found a causal relationship between Brady's childhood abuse and her crime, because her childhood experience made her "susceptible to relationships in which she may be taken advantage of or abused"); *see also Roe*, 976 F.2d at 1218 (recognizing extraordinary history of childhood neglect and abuse as a legitimate basis for downward departure, and remanding for reconsideration of whether defendant's circumstances were extraordinary).

Prior to *Booker,* consideration of cultural heritage, when it was defined as a "set of behavioral characteristics" separate from race and national origin, was not a strictly prohibited grounds for downward departure.[26] *See United States* v. Yu, 954 F.2d 951, 954 (3d Cir. 1992); *Guzman,* 236 F.3d at 837-38; U.S.S.G § 5H1.10 (race, sex, creed, national origin, religion and socio-economic status are not relevant factors). *But see* Ex. T at 3 *(Ranum).* This is even more the case following *Booker,* because the guidelines' former prohibition against considering the defendant's history and characteristics cannot be squared with § 3553(a)(1), which directs the court to review and consider the defendant's "history and characteristics." Ex. T at 3 (*Ranum*).

At a young age, Mayra Fernandez witnessed her father's continual physical abuse of her mother, and family members have told her that her father beat her mother

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[26] The defense recognizes that the Guidelines suggest neutrality regarding race, sex, national origin, creed, and socioeconomic status of offenders. *See* 18 U.S.C. § 994(d); *see also* USSG § 5H1.10.

while she was pregnant with Ms. Fernandez.[27] Beginning at the age of two, and continuing until she fled her family home at the age of twelve, Ms. Fernandez suffered daily physical abuse, often resulting in multiple bruises, bleeding, and more severe physical trauma. Ms. Fernandez has recounted that she was frequently struck on the head, beaten with a belt or a stick, thrown to the floor, and had her head banged against a wall. This physical abuse often came from Ms. Fernandez's own mother, or her older brother Tony.[28] On one occasion, Tony beat Ms. Fernandez unconscious, resulting in her hospitalization. The scar above Ms. Fernandez's eyebrow is a perpetual reminder of this particular episode.[29] During this influential period of her life, Ms. Fernandez frequently received emergency medical care for injuries sustained as a result of the abuses inflicted upon her.

The trauma Ms. Fernandez suffered as a child extended beyond corporal abuse—on occasion, the torture was perverse, and Ms. Fernandez was forced to suffer the degradation of sexual abuse at the hands of her own family members. At times, Tony forced Mayra to completely undress and kneel on the floor while he placed weights on her head. Ms. Fernandez also reports

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[27] Domestic violence and abuse of children, including physical, sexual, and psychological abuse are endemic in the Dominican Republic. Situations of abuse rarely reach the courts due to "fear of family embarrassment, lack of economic resources, and lack of knowledge regarding legal assistance." *See* Ex. BB at 12-14.

[28] Tony became the male figure of the household following the departure of Mr. Elias Fernandez when Mayra was very young. In the Dominican Republic, sixty percent of child abuse cases involve an accused that is close to the child, such as a family member. *See* Ex. BB.

[29] *See* Ex.C at ¶ 53.

that her mother would strip her naked and beat her with various objects.

At age twelve, following a particularly severe beating by her mother, Mayra fled from her home to that of William Henriquez,[30] an older youth that was pursuing her. Ms. Fernandez states that when she arrived at Mr. Henriquez's house, he locked her in a room with a padlock for five days—until Ms. Fernandez's mother effectively gave her away in an "arranged marriage" between Mr. Henriquez and Ms. Fernandez. *See* Ex. C ¶ 48; Ex. P (explaining that Ms. Fernandez's relationship with Mr. Henriquez caused her pain and "was something like a nightmare for her."). Ms. Fernandez relates that under the terms of the marriage agreement, Mr. Henriquez's family was to provide her with food, clothing, and education.[31] Mr. Henriquez is the father of Ms. Fernandez's first child, Wismary, whom she gave birth to via Caesarian section when she was only thirteen years old.

Ms. Fernandez has a history of suicidal behavior and psychological problems, some manifestations of which directly correlate to her early childhood traumas.[32] *See*

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[30] According to the Probation Department, Mr. Henriquez is responsible for the murder of Jose Ventura, Ms. Fernandez's ex-boyfriend. *See* Ex. C at ¶ 50.

[31] Ms. Fernandez has suggested that she was not sexually mature at the time she fled to Mr. Henriquez's home. Trafficking and sexual exploitation of children is also a serious problem in the Dominican Republic, as minors are often lured from their parental homes into sexual relationships that promise food or clothing. *See* Ex. BB at 14 (State Department Report).

[32] The Probation Department has determined that Ms. Fernandez is in need of emotional and psychological treatment, and recommends that this treatment be a condition of supervision following her release. *See* Ex. C, at 16 (PSR). The defense concurs with this assessment. *See* Section V(B) *infra*.

Ex. C ¶¶ 53, 56, 58-59. For example, Ms. Fernandez continues to be haunted by memories of watching her mother attempt to hang herself. As noted in the PSR, Mayra has attempted suicide by the same method, and perceived it as "finishing" the job her mother had started. *See* Ex. C at ¶¶ 56-59. The Probation Office reports that, prior to the time of the presentence interview in summer 2003, Ms. Fernandez had tried to kill herself on at least two distinct occasions, and has been placed on suicide watch several times during her incarceration.[33] *See* Ex. C ¶¶ 53, 58-59. It is a facile assumption that much of Ms. Fernandez's mental trauma results from the physical, sexual and mental abuse she has suffered during her childhood. *See* Ex. C at ¶¶ 56-59 and p. 16.

The foregoing extreme physical and sexual abuse provides the foundation for the mental manipulation practiced upon Ms. Fernandez—the same manipulation that resulted in Ms. Fernandez committing the crime for which she was convicted. The connection between Ms. Femandez's crime and the abuses she suffered throughout her childhood is undeniable. Thus, the defense respectfully submits that pursuant to the guidance provided in § 3553(a), the Court should take into account the extreme physical and sexual abuse that Ms. Fernandez suffered as a child and as a result should sentence Ms. Fernandez in a manner consistent with offense level 32, even if the Court finds that the abuse does not reach a level which it considers to be a sufficient basis for departure. *See Rivera,* 192 F.3d at 84-84; *Brady,* 2004 WL 86414 at *8; *Ramirez,* 2000 WL 759779 at *1; Ex. T at 3 *(Ranum).*

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[33] In its letter dated October 1, 2004, the defense offered to make available to the Court the medical files that it had received from the Bureau of Prisons; if the Court wishes, the defense will make these records available at this time for an *in camera* review.

2. *Mental Manipulation and Coercion from Loved Ones*

The defense considers the mental manipulation and coercion from Ms. Fernandez's loved ones to be inexorably linked with the physical and sexual abuse discussed immediately above. Therefore, the defense respectfully submits that pursuant to a Guidelines analysis, the Court may issue a Guidelines sentence of 121 months based upon finding that the facts in this section provide reason to depart from the otherwise applicable Guidelines range. In the alternative, upon consideration of Ms. Fernandez's personal history and characteristics pursuant to 18 U.S.C. § 3553(a)(1), the Court may issue a non-Guidelines sentence of 121 months.

Courts in this circuit recognize that "a full appreciation of [a] defendant's relevant mental state must include the effect of her circumstances on the decisions she made," even where a defendant "knew she was committing a crime by participating in drug dealing and chose to exercise whatever free will she had to act criminally." *United States* v. *Gaviria,* 804 F. Supp. 476, 481 (E.D.N.Y. 1992); *see also* USSG § 5K2.12 (departures based upon coercion and duress not amounting to a complete defense). Such circumstances, which may warrant a departure from the otherwise applicable Guidelines range pursuant to USSG § 5K2.12, have included physical and emotional abuse and coercion, and the plight of subservient, abused women when the severe effects of abuse linger. *See Gaviria,* 804 F. Supp. at 481.

The *Gaviria* court held that "[t]he Sentencing Guidelines fail to account for these endemic sociological and psychological realities. Nowhere in the Guidelines' formulaic mechanism is there room to consider . . . the facts of the life" of an abused woman. *See Gaviria,* 804 F. Supp. at 479.

Throughout her entire life, the male figures in Mayra Fernandez's life have wielded significant physical and mental influence over her. And every major male figure in Ms. Fernandez's life has been involved in drug related activity—her father, both of her husbands, and her deceased boyfriend, Jose Ventura.[34] *See* Ex. C at 16. Ms. Fernandez's first husband, William Henriquez, is currently incarcerated. *See* Ex. M. Ms. Fernandez's only prior conviction, which was for disorderly conduct, stemmed from Ms. Fernandez's relationship with her second husband, Juan Baldera.[35] *See* Ex. C at ¶¶ 39-41(PSR). Ms. Fernandez has related that Mr. Baldera told her to bring him marijuana while he was imprisoned at Riker's Island. *Id.* Mr. Baldera convinced Ms. Fernandez that he would be harmed if he did not have the marijuana to give to another inmate who was threatening him. Ms. Fernandez violated the law because she succumbed to Mr. Baldera's influence.[36] Ms. Fernandez's childhood abuse, feelings of abandonment, neglect, involuntary confine-

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[34] Ms. Fernandez witnessed the murder of Mr. Ventura at the hands of Mr. Henriquez. *See* Ex. C at ¶¶ 19 and 50. Ms. Fernandez has related that immediately prior to Mr. Ventura's murder, her apartment was robbed, and she was violently raped.

[35] Ms. Fernandez calls Mr. Baldera her "common law" spouse, and he is the father of Ms. Fernandez's second child, John Baldera. *See* Ex. C at ¶¶ 40, 49 (PSR). Mr. Baldera is the son of Maria Irizarry, Mr. Fernandez's mistress who has recently been convicted and sentenced for maintaining a premise for the purposes of distributing controlled substances. *See* Ex J (Aug. 11, 2003 transcript in Irizarry).

[36] Ms. Fernandez's adherence to the directions of Mr. Baldera comport with her upbringing in the Dominican Republic, which is as a male-dominated culture where domestic violence is widespread and unreported, and women have not traditionally enjoyed equal social or economic status. *See* Ex. BB at 12-13; *see also* Section IV(D)(1) *supra.*

ment, and learned subservience contributed to her submission to the will of both of her husbands and her father—the most influential male figure in her life.

Ms. Fernandez's father and her strong emotional reactions toward him led directly to the actions for which Ms. Fernandez was convicted. In his absence, Ms. Fernandez idealized her father from a young age, and entered her adult life with an overwhelming desire for his love and approval.[37] Ms. Fernandez reports that when she was a child, her father cut her hair short so she would look more like him, and he spoiled her with special gifts and foods. When Mr. Fernandez abandoned Mayra and her family,[38] Ms. Fernandez's feelings of abandonment were extreme. *See* Ex. P (expressing that the separation of Ms. Fernandez's parents was very painful for her and effected her physically and emotionally). Ms. Fernandez acted out her feelings by entering her father's new home to steal food and destroy his possessions. Ms. Fernandez states that she also began to manifest self-destructive behavior, and in one instance jumped from the roof of her home, shattering her jawbone.

When Ms. Fernandez arrived in the United States, she was reunited with her father and eventually became subsumed in his heroin culture.[39] Elias Fernandez taught his daughter to sell and package drugs and offered to help

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[37] *See* Ex. DD at 9:24-25; 10: 1 (Sept. 26, 2003 transcript in *United States* v. *Fernandez*, 02 Cr. 1398) (noting Mr. Fernandez's influence over his daughter).

[38] *See* Ex. C at ¶ 47 (describing her family's poor economic situation and the circumstances in which Mr. Fernandez left the family) (PSR).

[39] The Probation Office has determined that Ms. Fernandez is in Criminal History Category I. *See* Ex. C at ¶ 42. (PSR).

her pay for an apartment, on the condition that she assist him in his heroin operation, and allow him to store drugs there. *See* Ex. C at ¶¶ 15-20 (PSR). On January 16, 2004, Mr. Fernandez was sentenced to 135 months in prison for conspiracy to distribute and possession with intent to distribute heroin and cocaine. *See* Ex. EE (judgment entered in *United States* v. *Elias Fernandez)* and Ex. I.

As described above, Ms. Fernandez was subjected to intense childhood physical and sexual abuse. She was raised in a culture where males are perceived as dominant and women learn to be subservient. *See* Ex. BB at 12-13 (U.S. State Dep't Rep.); Ex. CC at ¶ 62 (U.N. Report). In Ms. Fernandez's case, this culturally-ingrained inferiority was exacerbated by her early experiences with men, as she was physically, sexually, and/or emotionally abused by several males in her life. The males in her life forced their will upon her, and Mayra had no choice but to learn to adhere to their will. It is undeniable that this confluence of abuse had a direct causal connection to the crimes Ms. Fernandez was convicted of, because the males in her life lead criminal lifestyles and have consistently used their influence to overwhelm Ms. Fernandez.

By failing to account for the situation of the subservient woman, the Guidelines hinder rather than advance the statutory objectives of 18 U.S.C. § 3553(a)(1) and (2). *Id.*; *United States*

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see also USSG § 5K2.0. For these reasons, Ms. Fernandez should be sentenced to a term of 120 months.

B. *Application of the Remaining Factors Enumerated in 18 U.S.C. § 3553(a) Strongly Suggest That Ms. Fernandez Should be Sentenced to a Term of Imprisonment of 120 Months*

The Probation Department has recommended to the Court that Ms. Fernandez be sentenced at the low end of the sentencing range calculated in the PSR. *See* Ex. C at 17. The defense is in agreement with the recommendation of the Probation Department that Ms. Fernandez should be sentenced to the low end of the appropriate sentencing range. As set forth in *Booker* and in Section III *supra,* in deciding upon the proper length of a term of imprisonment, this Court should consider the factors set forth in 18 U.S.C. § 3553(a). *See also* 18 U.S.C. § 3582(a). This Court is instructed to impose a sentence "sufficient, but not greater than necessary to comply with the purposes" of sentencing, including rehabilitation, deterrence, and protection of the public. 18 U.S.C. § 3553(a). We respectfully submit that, upon reasoned consideration of the sentencing factors enumerated in 3553(a) that a sentence of 120 months is sufficient to comply with 18 U.S.C. § 3553(a) and that a sentence in excess of 120 months is greater than necessary.

1. *Nature of the Offense and the Characteristics of the Defendant*

In determining a defendant's sentence, 18 U.S.C. § 3553(a)(1) instructs a sentencing court to consider the nature of and circumstances of the offense and the history and characteristics of the defendant. Ms. Fernandez's unique familial circumstances are detailed *supra* and we respectfully submit that these circumstances warrant a finding that Ms. Fernandez's offense level should be decreased from level 36 to level 32, and a Guidelines-departure sentence of 120 months, or a non-Guidelines sentence of 120 months should be imposed.

2. *Consideration of the Goals of Sentencing*

Since being imprisoned, Ms. Fernandez has made strides towards developing herself as a productive member of society. *See supra* Section IV. The chaplain at Valhalla Correctional Facilities has noted that, when Ms. Fernandez first attended services, she was negative and bitter. *See* Ex. KK (copy of letter written by Rev. Charles Albert). Reverend Albert writes that now, Ms. Fernandez "recognizes her mistakes and waits upon the Lord . . . [She] wants to change for her children so that she can be a good example for them." *See* Ex. KK (Albert letter). She has received various recognitions for her efforts in the living skills programs offered by the Department of Corrections. *See* Ex. LL (copy of a letter of appreciation sent to Ms. Fernandez by the St. John's Riverside Hospital); Ex. S. One of Ms. Fernandez's instructors has cited her as a selfless individual who is eager to dedicate "her time to assist those other Spanish speaking students that need individualized attention." *See* Ex. Q (BOCES letter). While imprisoned, Ms. Fer-

nandez has received a vote of confidence from her instructors. *See* Ex. Q ("[i]t seems the current experience has made her re-evaluate her goals and aspirations. Given a chance I believe she will be a valuable contributor to our society."); *see also* Ex. R (stating that Ms. Fernandez is eager to learn to speak English and when Ms. Fernandez is released from prison, "I believe that she will be the best person and mother that she could be.").

With regard to the duration of imprisonment, case law in this district indicates that a sentence at the low end of the guidelines range is appropriate for a defendant such as Ms. Fernandez, who (a) grew up in impoverished circumstances; (b) had a less than substantial role in the ongoing conspiracy; and (c) has made efforts to rehabilitate her behavior. *See U.S.* v. *Jones,* 99 Cr. 338-05, 2003 WL 174312 (S.D.N.Y. Jan. 27, 2003). As recommended by the Probation Office, a sentence at the low end of the applicable guidelines range is the most appropriate sentence under the circumstances.

As described more fully in Section IV *supra,* Ms. Fernandez has attempted suicide on various occasions. She has been placed on suicide watch several times during her incarceration, and has been given various medications for her conditions. For these reasons and others referenced below, it is urged here that the Court make a recommendation that Ms. Fernandez continue to receive psychiatric care while she is imprisoned. *See United States* v. *Jones,* Crim. 04-96-P-H., 2005 WL 121730, at **2 (Jan. 21, 2005) (finding that the court should not follow the Guidelines and would instead sentence defendant more leniently, based in part upon the defendant's documented and undisputed history of mental illness and his efforts to abide by a treatment plan).

A sentence at the low end of the guidelines range will adequately punish Ms. Fernandez, but will also allow her to remain an important part of her children's lives. As explained above, Ms. Fernandez herself grew up without a father, and none of her children currently have either parent to care for them. If this Court sentences Ms. Fernandez to a sentence of 121 months (the low end of the guidelines range at offense level 32), Ms. Fernandez will be eligible for release in, at most, seven and a half years.[46] *See* 18 U.S.C. § 3585(b). Upon release, Ms. Fernandez's children will be approximately ages sixteen, thirteen, and nine. The ability of Ms. Fernandez to be a meaningful part of her children's upbringing wholly depends upon the length of the sentence imposed by this Court.[47]

In the instant case, a lengthy prison term would be devastating to an entire family. Of the four goals of sentencing—retribution, deterrence, incapacitation, and rehabilitation—only the goals of retribution and incapacitation would be served if this Court were to sentence Ms. Fernandez to a lengthy prison term. Many lives already have been ruined in the wake of Elias Fernandez's drug dealing. Mayra Fernandez has no criminal history points, and therefore a ten-year sentence will deter her from any future criminal activity. As evidenced by the letters appended hereto as exhibits, Ms. Fernandez has both an immediate family and an extended family that depends upon her and will support her. *See, e.g.* Ex. E.

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[46] Assuming that Ms. Fernandez receives all eligible "good time" credit pursuant to 18 U.S.C. § 3624(b), she would be eligible for release in approximately six to six and a half years.

[47] Ms. Fernandez has spent a total of three days with her youngest child, two year-old Miguel Angel, who was born in prison shortly after her conviction for the instant offense.

The sentencing most beneficial to Ms. Fernandez, Wismary Henriquez, John Baldera, Miguel Angel, and society as a whole, will allow Ms. Fernandez to serve the minimum term allowable under the sentencing guidelines, 120 months.

3. *The Kinds of Sentences Available*

This brief addresses § 3553(a)(4) and the appropriate sentencing range in this matter in Section IV *supra*. As demonstrated above, proper application of the USSG results in a level 32 offense level calculation, and a sentence at the low end of that range.

4. *The Need to Avoid Unwarranted Sentencing Disparity, Combined With a Consideration of Relevant Policy Statements, Supports the Requested Sentence*

The Second Circuit in *Crosby* recognized the unreasonableness of inflexible, formulaic sentencing and noted that "individualized justice" does not run counter to uniform sentencing. *Crosby*, 2005 WL 240916, at *7; *see also* Section III, *supra*. In that regard, Section 3553(a)(6) directs sentencing judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records." 18 U.S.C. § 3553(a)(6). Indeed, the USSC modified the "relevant conduct" provisions of the Guidelines over time to reflect a "real offense" sentencing scheme precisely because it wanted to avoid unwarranted sentencing disparities resulting from inconsistent charging practices.[48]

[48] As indicated *seriatim* throughout this brief, the Court is urged to follow the guidance provided by the Sentencing Commission in the USSG, and, at this time, the defense is not seeking any sen-

See USSG § 6A1.3 cmt. (2004); *see also* 18 U.S.C. § 3553(a)(5) (requiring courts to consider pertinent policy statements by the Sentencing Commission); *see also* United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Criminal Justice System is Achieving the Goals of Sentencing Reform*, at Ch. 3 (2004). The need to avoid treating dissimilar defendants in a similar manner cannot be over-emphasized.[49] The PSR suggests such disparity—to treat Mayra Fernandez the same as, or worse than, Elias Fernandez.

The Court in *United States* v. *Revock* determined that "sentencing disparity [caused by] applying the Guidelines in [certain] situation[s] may sometimes warrant . . . a sentence outside the Guideline range." *United States* v. *Revock*, No. CRIM. 04-105-P-H, 2005 WL 188704, at *2 (D. Me. Jan. 28, 2005).[50] There, the Court held that the two defendants engaged in not just similar but identical criminal activity and were "identical in all sentencing aspects" but for the fact that one defendant was sentenced before *Booker* and the other after *Booker*.

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tencing departure that is prohibited by relevant Sentencing Commission policy as promulgated in the 2001 USSG. *See supra* Section IV(A) *supra*.

[49] *See* United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Criminal Justice System is Achieving the Goals of Sentencing Reform*, at Ch. 3 (2004).

[50] Even if the Court does not believe that the Guidelines advise the sentence requested by Ms. Fernandez in Section IV, *supra*, §§ 3553(a)(5)-(6) provide independent bases for imposing the requested sentence and achieving more "individualized justice." *See also*, *United States* v. *Jones*, 2005 WL 121730, at *2 (D. Me. Jan. 21, 2005) (using the § 3553(a) factors to impose a sentence consistent with the requested departure that could not technically be granted under the Guidelines).

See id. at *1. Both defendants had the same Criminal History Category but the defendant sentenced in *Revock* faced more time under the Guidelines. *See id. Revock* concluded that the § 3553(a) factors, especially those bearing on sentencing disparity, counseled a non-Guidelines sentence that would result in both defendants receiving the same treatment.

Concerns regarding sentencing disparity do not only refer to treating similarly situated defendants in a dissimilar fashion, but sentencing disparity also occurs when one defendant receives the same (or a more lenient) sentence compared to a defendant whose criminal conduct was less severe. Determining how defendants are situated compared to one another might be difficult in some cases, but such is not the case here. Just as in *Revock,* Ms. Fernandez's conduct lends itself to easy comparison with Elias Fernandez's and demonstrates the appropriateness of the sentence she requests, a sentence of 121 months.

Ms. Fernandez's conviction was based on a superseding indictment alleging one count of engaging in a criminal conspiracy that spanned less than one year. *See* Ex. C at 2 (PSR). Elias Fernandez pled guilty to two counts of engaging in a criminal conspiracy occurring over four and a half years—from early 1998 to June 2002. *See* Ex. Z at ¶ 1. As discussed *supra,* Ms. Fernandez was convicted at trial of conspiracy to distribute and possession with the intent to distribute one kilogram and more of heroin. *See* Ex. B. This Court opined in October 2003 that, at that time, the Court's analysis was that Ms. Fernandez may be held, at most, responsible for 2.1 kilograms of heroin and 30 kilograms of cocaine. *See* Ex. X; *see also* Section IV(B), *supra.*

Elias Fernandez has pled guilty to a superseding indictment alleging a drug quantity of 1.4 kilograms and

5 kilograms of cocaine—an amount substantially greater than that for which Mayra Fernandez was convicted, and the Probation Department acknowledges that Elias probably recruited Mayra into his drug trafficking conspiracy, introduced her to other drug traffickers and taught her how to package and traffic drugs. *See* Ex. C at 4, ¶¶ 15-17, ¶ 22, pp. 15-16 (PSR). More importantly, Ms. Fernandez's PSR states that Elias Fernandez was present at every activity in which drugs were exchanged. *See* Ex. C at 4, ¶¶ 15-17, ¶ 22. As such, Elias Fernandez's real offense conduct extends far beyond the amount provided in his guilty plea. *See* Ex. AA (testimony of Joaquin Hernandez in *United States* v. *Fernandez*, 02 Cr. 1398) (stating that "I was supposed to bring back 30 kilos of cocaine, and, out of that amount, ten of the kilos were for Mr. Elias Fernandez.") Despite these facts, Elias Fernandez was granted a two-level safety-valve departure and received the minimum Guideline sentence of 135 months. Ms. Fernandez's PSR suggests a sentence of *no less than* 188 months.

In order to reflect consistency in charging practices, and to avoid unwarranted sentencing disparities between herself and Elias Fernandez, the defense submits that this Court should impose a sentence of no greater than 121 months.

5. *Factors Not Determinative to the Court's Analysis*

Some of the § 3553(a) factors have little or no impact upon the sentencing calculus in the instant case. In the interest of adhering to the Second Circuit's mandate in *Crosby* that sentencing judges consider all of the 3553(a) factors, the following brief analysis is provided. *See Crosby*, 2005 WL 240916, at **5,7,9.

Pursuant to 18 U.S.C. § 3553(a)(3), the Court shall consider the kinds of sentences available. As discussed *infra* in Section IV, this Court is constrained by statutory law to sentence Ms. Fernandez to a minimum sentence of 120 months imprisonment, and therefore there is no other type of sentence to be considered, other than incarceration.

The Probation Office has not identified any victims of Ms. Fernandez's offense, and therefore, pursuant to 18 U.S.C. § 3553(a)(7), the need to provide restitution to victims of the offense, should have no import upon the Court's sentencing decision.

VI. CONCLUSION

Mayra Fernandez and her counsel greatly appreciate the great time and effort this Court has expended, and will continue to expend, in determining the appropriate sentence to impose upon Ms. Fernandez on March 11, 2005. Multiple considerations play a part in any judicial sentencing decision, and this case is no different. It is submitted that, at end, the set of facts in this case should persuade the Court to sentence Ms. Fernandez in a manner consistent with an offense level of 32, to a term of 121 months, pursuant to a Guidelines sentence (without a departure), or to 120 months pursuant to a Guidelines-departure sentence or a non-Guidelines sentence.

For all the reasons stated above, we respectfully request that this Court:

(a) pursuant to a Guidelines sentence, sentence Ms. Fernandez, based upon an advisory guidelines level of 32 and a Criminal History Category of I, to 121 months; or

(b) sentence Ms. Fernandez to 120 months pursuant to a Guidelines-departure sentence or a non-Guidelines sentence; and

(c) recommend to the Bureau of Prisons that Ms. Fernandez continue to receive psychiatric care.

Respectfully submitted,

By: /s/ LANCE CROFFOOT-SUEDE
Lance Croffoot-Suede (LC - 3725)
Joseph Mack (JM - 5128)
Victoria Oriowski (VO - 6961)

WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036-2787
(212) 819-8200
(212) 354-8113 (facsimile)

Attorneys for Defendant

Mayra Fernandez

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
PROBATION OFFICE

MEMORANDUM

TO: HONORABLE DENISE L. COTE
U.S. District Judge

FROM: CLAUDE JEAN-BAPTISTE
Senior U.S. Probation Officer

RE: FERNANDEZ, MAYRA
DKT. #: (R)02 CR 1398(DLC)

DATE: JULY 18, 2003

Attached is the Pre-sentence Investigation report, including the recommendation and addendum, prepared on *June 18, 2003* on the above-named individual, who is scheduled for sentencing on *July 25, 2003.* Based on objections to the PSI and/or information received after the draft report was disclosed, the attached PSI has been revised as indicated in the addendum.

Respectfully submitted,

Chris J. Stanton
Chief U.S. Probation Officer

By: /s/ CLAUDE JEAN-BAPTISTE
CLAUDE JEAN-BAPTISTE
Senior U.S. Probation Officer
212-805-5187

cc: Gregory Cooper, Esq. (With attachment)
Robin Linsenmayer, AUSA (With attachment)
Raymond Lohier, AUSA (With attachment)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PRESENTENCE INVESTIGATION REPORT
Docket No.: (R) 02-CR-1398(DLC)
Sentence Date: July 25, 2003

UNITED STATES OF AMERICA

—vs.—

MAYRA FERNANDEZ
A/K/A: "Le Jefa"
A/K/A: "Morena"

Prepared For: HONORABLE DENISE L. COTE
U.S. District Judge

Prepared By: Claude Jean-Baptiste
Sr. U.S. Probation Officer
212-805-5187

Assistant U.S. Attorney
Robin Linsenmayer/
Raymond Lohier
212-637-2307/2235

Defense Counsel
Gregory Cooper
20 Vesey Street
New York, NY 10007
212-608-4828

Offense: Count 1: CONSPIRACY TO POSSESS AND DISTRIBUTE HEROIN (21 USC 841(b)(1)(A). 846), A Class A felony

Penalties: 10 years to life imprisonment, 5 years to life supervised release, $4 million fine, $100 special assessment

Release Status: Remanded since arrest on 8/27/02.

Detainers: None

Codefendants: None

Related Cases: See Charge(s) and Conviction(s) Section

Identifying Data:

Date of Birth: 7/15/82
Age: 21
Race: Hispanic
SSN: Unknown
Sex: Female
FBI No: 146261XB4
Marital Status: Single
NYSID No: 9505156K
Education: 8th Grade
USM No: 54089-054
Dependents: Three
Other ID No: A04655068(BCIS)
Address: 107 Heatcote Dy.
Lindenhurst, NY
Citizenship: Dominican Republic

Date Prepared: 6/18/03 **Date Revised:** 7/18/03

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. Indictment 02-CR-1398 (DLC) was filed in the Southern District of New York on October 29, 2002.

2. Count 1 - From at least August 1999 to at least May 2002, MAYRA FERNANDEZ, a/k/a "La Jefa," a/k/a "Morena," and others conspired to distribute and possess with intent to distribute one kilogram and more of heroin, in violation of 21 USC 812, 841(a)(1) and 841(b)(1)(A).

(21 USC 846)

3. During trial, at the request of the government, Redacted Indictment 02-CR-1398(DLC) was filed, which charges as follows:

4. Count 1 - From at least Fall 2001, to at least May 2002, MAYRA FERNANDEZ, a/k/a "La Jefa," and others conspired to distribute and possess with intent to distribute one kilograrn and more of heroin, in violation of 21 USC 812, 841(a)(1) and 841(b)(1)(A).

(21 USC 846)

5. On March 7, 2003 the defendant was found guilty of Count One of Redacted Indictment 02-CR-1398(DLC). Sentencing is scheduled for July 25, 2003.

Related Case(s)

6. On October 16, 2002, Elias Nazario Fernandez (P36606/Unassigned) pleaded guilty to Conspiracy to Distribute and Possess With Intent to Distribute Narcotics (21 USC 846) and Distribution and Possession With Intent to Distribute Narcotics as charged in Superseding felony Information S1 02-CR-881(HB), before the Honorable James C. Francis IV. U.S. Mag-

istrate Judge. Sentencing is scheduled for July 24, 2003, before the Honorable Harold Baer. Jr.

7. On October 21, 2002, Richard Hernandez (P36606/ J.Y. Kim) pleaded guilty to Conspiracy to Distribute and Possess With Intent to Distribute Heroin (21 USC 846) and Distribution and Possession With Intent to Distribute Heroin (21 USC 841(b)(1)(C) as charged in Superseding felony Information S2 02-CR-881(HB), before the Honorable Debra C. Freeman, U.S. Magistrate Judge. Sentencing is pending before the Honorable Harold Baer, Jr.

8. On October 22, 2002, Helena Alexandra Gonzalez (P36615/G.P. Steele) pleaded guilty as charged in felony Information 02-CR-1376(AGS), charging her with Conspiracy to Furnish a False Passport, before the Honorable Allen G. Schwartz. On February 3, 2003, Helena Gonzalez was sentenced to a one-year term of probation.

9. On April 14, 2003, Esperanza Hernandez (P36616/ A. Ceballos) pleaded guilty as charged in one-count Superseding felony Information S4 02 CR 877 (GEL), charging her with Conspiracy to Distribute and Possess With Intent to Distribute Narcotics, before the Honorable Gerard E. Lynch, U.S. District Judge. Sentencing is pending.

10. On April 21, 2003, Melvin Rivera (P36614/J.Y. Kim) pleaded guilty as charged in one-count Superseding felony Information S5 02 CR 877 (GEL), charging him with Conspiracy to Distribute and Possess With Intent to Distribute Narcotics, before the Honorable Gerard E. Lynch, U.S. District Judge. Sentencing is scheduled for July 21, 2003.

11. On May 7, 2003, Alvaro Cuenca (P36613/J.Y. Kim) pleaded guilty as charged in three-count Superseding felony Information S3 02 CR877 (GEL), charging him with one count of Conspiracy to Distribute and Possess With Intent to Distribute Narcotics, one count of Distribution and Possession With Intent to Distribute Narcotics, and one count of Theft of a Motor Vehicle, before the Honorable Gerard E. Lynch, U.S. District Judge. Sentencing is scheduled for August 5, 2003.

12. On May 15, 2003, John Jairo Melo (P36617/C.T. Ferrall) pleaded guilty as charged in Superseding felony Information S6 02 CR 877 (GEL) to one count of Conspiracy to Distribute and Possess with Intent to Distribute Heroin, before the Honorable Henry B. Pitman. Sentencing is scheduled for August 15, 2003, before the Honorable Gerard E. Lynch, U.S. District Judge.

13. Charges are pending against Alberto Gonzalez, William Gonzalez, Steven Gonzalez, and Maria Irrizary, before the Honorable Gerard E. Lynch, U.S. District Judge, under Indictment 02 CR 877 (GEL).

The Offense Conduct

14. MAYRA FERNANDEZ was a heroin trafficker who stored, processed and packaged heroin out of her apartment on Andrews Avenue in the Bronx, New York. FERNANDEZ was a part of a family whose business it was to buy and sell heroin. The family heroin business had suppliers and smugglers for the heroin that it peddled. MAYRA FERNANDEZ, and her father, Elias Nazario Fernandez, a/k/a "Jose,"

a/k/a "Viejo," obtained their heroin from different sources in the Caribbean and in South America.

15. In April 2002, Elias Nazario Fernandez came into MAYRA FERNANDEZ's Bronx apartment and introduced her to Joaquin Hernandez, who claimed to be able to smuggle heroin for the family heroin business. A few weeks later, Joaquin Hernandez again met FERNANDEZ inside of her Bronx apartment with her father, Elias Nazario Fernandez. During the meeting, FERNANDEZ placed a large amount of heroin on her dining room table for Hernandez to see. Hernandez subsequently had two other meetings with MAYRA FERNANDEZ in her apartment, where she discussed storing and buying large quantities of heroin.

16. Regarding MAYRA FERNANDEZ's first meeting with Joaquin Hernandez in Spring 2002, Elias Nazario Fernandez and Joaquin Hernandez drove to FERNANDEZ's apartment building at 2285 Andrews Avenue in the Bronx and Elias Fernandez announced that he had to get some "material" from inside FERNANDEZ's apartment (the term "material" was a code word for heroin). When Elias Fernandez and Hernandez entered FERNANDEZ's apartment, FERNANDEZ and Elias Fernandez went to the kitchen while Joaquin Hernandez stayed in the living room area. After a few minutes, Elias Fernandez emerged from the kitchen and he and Hernandez left FERNANDEZ's apartment together. After leaving FERNANDEZ's apartment and entering their car, Elias Fernandez removed a few rubber packages of heroin from his pocket and put them in a secret compartment in the car.

17. A week or two following the first meeting, Elias Fernandez and Joaquin Hernandez returned to MAYRA FERNANDEZ's apartment at 2285 Andrews Avenue in the Bronx, for the purpose of "fixing" some wet heroin that was stashed in FERNANDEZ's apartment (heroin, which generally comes in a dry powdered form, loses its purity and value when wet). After arriving at the apartment, FERNANDEZ stated that she had tried to dry the heroin but that it had not worked. FERNANDEZ and Elias Fernandez then went into another part of the apartment, brought out wet heroin on a piece of tinfoil and went with it into the kitchen, where FERNANDEZ brought out a blow dryer and she and Elias Fernandez attempted to blow dry the heroin. At one point, MAYRA FERNANDEZ told Elias Fernandez where he could find a scale to weigh the heroin and a heroin press to prepare and package it. FERNANDEZ then placed the heroin on the dining room table. During this time, FERNANDEZ's daughter was sitting watching television in the same room a few feet away. After discussing the quality of the heroin, FERNANDEZ and Elias Fernandez decided that it was still too moist to package properly. FERNANDEZ then remained in the apartment to take care of the matter while Elias Fernandez and Joaquin Hernandez left.

18. MAYRA FERNANDEZ met with Joaquin Hernandez for a third time in May 2002. During their meeting, FERNANDEZ agreed to have Hernandez deliver about two kilograms of heroin from the Caribbean island of Aruba, to be stored in her apartment. During a final meeting in mid May 2002, Joaquin Hernandez and MAYRA FERNANDEZ dis-

cussed traveling to South America to buy more heroin.

19. Within a week or two of the last meeting between MAYRA FERNANDEZ and Joaquin Hernandez, Jose Ventura, FERNANDEZ's boyfriend, was shot and murdered outside FERNANDEZ's apartment door at 2285 Andrews Avenue. When New York City Police Detectives responded to the shooting, they discovered heroin packaging and processing materials in a box just outside of FERNANDEZ's apartment. Although FERNANDEZ denied knowing anything about the box or its contents, police officers and a special agent of the Drug Enforcement Administration (DEA) found more of the same heroin-related materials inside her living room and in her bedroom. FERNANDEZ again denied knowing anything about the heroin-related material found inside of her apartment, saying that she suspected that others had planted the material there.

20. Approximately a month after the shooting outside of MAYRA FERNANDEZ's apartment, DEA agents began to arrest the members of the family heroin business, including Alberto Gonzalez, Steven Gonzalez, John Jairo Melo, a/k/a "Leo Castillo," Claudia Gonzalez, Melvin Rivera, a/k/a "Melva," a/k/a "Melary," Alvaro Cuencas, a/k/a "Mauricio," Richard Hernandez, a/k/a "Richard Fernandez," Paulette Dildy, a/k/a "Sugar," Helena Alexandra Gonzalez, a/k/a "Calandra," and Esperanza Hernandez, a/k/a "Diana." The DEA also arrested Elias Fernandez and MAYRA FERNANDEZ's "stepmother," Maria Irrizary, a/k/a "Vieja," a/k/a "Mirta," who resided with FERNANDEZ's father, Elias Fernandez. DEA agents also attempted to arrest FERNANDEZ the

same day, but could not locate her. The DEA eventually discovered that FERNANDEZ had purchased a single one-way ticket to the Dominican Republic the day after her father and stepmother had been arrested, and flown to the Dominican Republic the next morning on a 7:00 a.m. flight.

21. On August 27, 2002, MAYRA FERNANDEZ was arrested by agents of the Drug Enforcement Administration (DEA) in Lindenhurst, New York (apparently at the home of her sister).

22. Pursuant to §1B1.3 (Relevant Conduct), MAYRA FERNANDEZ is held accountable for 4.1 kilograms of heroin, and 30 kilograms of cocaine. According to trial testimony, Joaquin Hernandez, Elias Fernandez and MAYRA FERNANDEZ negotiated for the importation of 2 kilograms of heroin and 30 kilograms of cocaine from the Caribbean to New York. Trial testimony also revealed that FERNANDEZ possessed 50 to 100 grams of heroin in her apartment at 2285 Andrews Avenue, Bronx, New York, in April or May 2002, and that Elias Fernandez picked up several "fingers" of heroin from FERNANDEZ's apartment in April 2002.

23. Moreover, according to the Government, although not introduced at trial, MAYRA FERNANDEZ is also held accountable for a two-kilogram shipment of heroin destined for the Bronx, that was intercepted in Ecuador. The package containing the heroin was addressed to the fictitious name "Augustin Marrero" at 2185 Valentine Avenue, Apt. 1H, Bronx, New York. The "contact telephone number" listed on the package was subscribed in the name of MAYRA FERNANDEZ, who lived alone in a different apartment in the same building. Upon further

investigation, agents learned that Apartment 1H had been empty for several months. They also learned that Donoso Express, the shipping company through which the heroin was sent, does not deliver, but calls the "contact telephone number" in order to arrange for the package to be picked up. Had the package not been intercepted in Ecuador, Donoso Express would have attempted to call MAYRA FERNANDEZ to arrange for the heroin shipment to be picked up once the package arrived in New York.

Adjustment for Obstruction of Justice

24. The probation officer has no information to suggest that the defendant impeded or obstructed justice at the time of the arrest, or during the investigation or prosecution of the offense.

Adjustment for Acceptance of Responsibility

25. On advice of counsel, the defendant did not make a statement regarding her involvement in the offense.

Offense Level Computation

26. The April 30, 2003, edition of the Guidelines Manual has been used in this case.

Count One - Conspiracy to Possess and Distribute Heroin

27. **Base Offense Level:** The guideline for a violation of 21 USC 841(b)(1)(A) is found in § 2D1.1. According to the Offense Conduct section, including relevant conduct, the defendant's criminal activity involved 4.1 kilograms of heroin and 30 kilograms of cocaine. Pursuant to the Drug Equivalency Table, 4.1 kilograms of heroin and 30 kilo-

grams of cocaine equals 10,100 kilograms of marijuana. The offense level specified in the Drug Quantity Table under § 2D1.1(c)(2), sets a base offense level of 36. 36

28. **Specific Offense Characteristic:** None. 0

29. **Victim-Related Adjustments:** None. 0

30. **Adjustments for Role in the Offense:** None. 0

31. **Adjustment for Obstruction of Justice:** None. 0

32. **Adjusted Offense Level (Subtotal):** 36

33. **Adjustment for Acceptance of Responsibility:** None. 0

34. **Adjusted Offense Level:** 36

35. **Chapter Four Enhancements:** None. 0

36. **Total Offense Level:** 36

PART B. DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

37. None.

Adult Criminal Convictions

38. Available information indicates that the defendant was represented by counsel in all matters resulting in conviction, unless otherwise noted. (Since 1965, the right to legal representation has been mandated by Article 18-B of the New York State Counties Law.)

	Date of Arrest	Conviction/Court
39.	2/18/00 Age: 17	Disorderly Conduct/ Manhattan Criminal Court, NY (Dict.# 2000BX012010)

Date Sentence Imposed/Disposition	Guideline	Pnt
3/22/00: 1-year conditional discharge with 8 days' community service 2/26/01: Resentenced to 8 days' community and 1-year conditional discharge to expire on 2/25/02	4A1.2(c)(1)	0

40. The defendant was arrested at Riker's Island attempting to smuggle marijuana concealed in a balloon to an inmate (her "common law" spouse Juan Baldera). Following her arrest, Fernandez acknowledged to prison officials that she had done this on several occasions in the past as well. Fernandez pleaded guilty to disorderly conduct and was sentenced to eight days' community service and one year of conditional discharge, to expire on March 21, 2001. She failed to complete the community service obligation, and she was re-sentenced on February 26, 2001, to 8 days of community service, plus another year of conditional discharge to expire on February 25, 2002. It is unknown whether the

defendant ever completed the community service obligation.

Criminal History Computation

41. The criminal convictions above result in a subtotal criminal history score of 0.

42. The total of the criminal history points is 0. According to the sentencing table at Chapter 5, Part A, 0 criminal history points establish a Criminal History Category of I.

Other Criminal Conduct

43. The defendant was arrested in May 2002, in the Bronx, New York, and charged with disorderly conduct. Apparently, Fernandez was arrested after becoming involved in an altercation (possibly a slashing) with another individual at a pool hall at 181st Street and Valentine Avenue in the Bronx. It appears that this arrest was sealed and so no information on the disposition of the matter was readily available.

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

44. The presentence interview was conducted with the aid of a Spanish interpreter, as the defendant does not speak English.

45. According to information obtained from the Bureau of Citizenship and Immigration Services (BCIS), Mayra Fernandez was born in the Dominican Republic on July 15, 1982 (Fernandez stated that she was born in the town of Moca). Her parents are

Anna Ramona Paula, age 58, who resides in San Francisco de Macoris, Dominican Republic, and Elias Nazario Fernandez, age 60, who is a co-conspirator in the instant case, and is presently incarcerated.

46. Fernandez has two siblings residing in the United States. Margarita Hernandez, the defendant's 36-year-old maternal half sister, is a homemaker residing in Lindenhurst, Long Island, and Altagracia Fernandez, age 22, is a factory worker residing in Lawrence, Massachusetts. The defendant has four additional siblings, three females and one male, all residing in the Dominican Republic. She also had a brother who died years earlier in the United States of leukemia.

47. Our subject related that her parents separated when she was two years old, saying that her father never contributed financially to the household. The defendant and her siblings were thereafter raised under poor economic circumstances by Fernandez's mother, who supported her children by taking in wash and cleaning homes. Fernandez stated that at a young age, she began working at a beauty salon in order to contribute financially to the household.

48. When the defendant was 13 years old, she had the first of her three children. Her daughter, Wimarys Henriquez, age 7, is the product of the defendant's relationship with William Henriquez, age 28. Fernandez stated that their parents "forced us to get married (common law) because he took me." Wimarys is presently in the Dominican Republic being cared for by the defendant's mother. Henriquez is also presently in the Dominican Republic.

49. The defendant stated that she immigrated to the United States in 1997, and resided with her father, and stepmother, Eva DeJesus. According to information obtained from the BCIS, she is legally residing in the United States as a permanent resident. She had her status adjusted on April 29, 1998 (file no. A04655068). Fernandez's second child, John Baldera, age 4, is the product of her relationship with Juan Baldera, age 24, who is the son of her father's mistress Maria Irrizary, who is another co-conspirator in the instant case (the defendant stated that her father introduced his mistress to her stepmother as an extended family member and brought her to family functions). John Baldera is presently being cared for by his paternal grandparents and aunt in the Bronx, New York. Juan Baldera is currently incarcerated.

50. Fernandez was involved in a brief relationship with Jose Ventura, who was murdered by William Henriquez on May 23, 2002. She initially stated that Ventura was the father of her third child, Miguel Angel Fernandez, approximately two months old, but admitted that she does not know who her child's father is, after her attorney advised her to be completely candid during the presentence interview, Miguel Angel Fernandez is being cared for by the defendant's sister, Altagracia Fernandez, in Lawrence, Massachusetts.

51. During the course of the conspiracy, Fernandez resided at 2285 Andrews Avenue, Bronx, New York. At the time of her arrest, she was residing with her sister Margarita Hernandez, in Lindenhurst, New York.

52. Fernandez's sisters, Margarita Hernandez and Altagracia Fernandez, were interviewed and corroborated the information which the defendant provided regarding her family and social history. Both of Fernandez sisters stated that they knew nothing more of the defendant's case than the fact that she was involved in a drug conspiracy, and are aware that the defendants father is also incarcerated for the same reason.

Physical Condition

53. Mayra Fernandez stands 5'5" tall, weighs approximately 148 pounds, and has brown eyes and dark brown hair. As for distinguishing marks/characteristics, Fernandez has a scar on her right arm and small scar on her forehead (she stated that the scar on her arm was the result of an operation performed shortly after her birth, and could offer no further explanation other than saying that the operation was performed because she had difficulty breathing). More significantly, Fernandez has a scar on her left wrist from a suicide attempt. She advised that in approximately 1999/2000, she was distraught because she was homeless and living in the streets, and attempted to kill herself. She stated that passers-by attempted to take her for medical treatment at a hospital, but she refused to go.

54. Our subject has tattoos of the initials of her children on her right shoulder, and of an angel on her back.

55. On January 10, 2002, per order of the Court, Fernandez was remanded to the MCC in lieu if bail, as it was felt that Fernandez required medical attention. The defendant was pregnant and receiving medication for a tooth extraction, and refused to

take the medication because she felt that it was inappropriate due to her pregnancy.

56. We were advised by defense counsel that following her conviction, and while being held at the Metropolitan Correctional Center (MCC), the defendant reportedly attempted to harm herself and her then unborn child. She was therefore sent to a medical facility for observation. SENTRY Systems records indicate that on March 7, 2003, Fernandez was taken to an unspecified local hospital and held through April 25, 2003. (Based on review of MCC medical records, we have determined that the hospital was Beekman - New York Downtown Hospital. We wrote requesting medical records from Beekman - New York Downtown Hospital, New York, New York, but have received no response to date).

Mental and Emotional Health

57. Fernandez stated that in May 2002, following the murder of her boyfriend, Jose Ventura, she received psychological counseling at a facility known as "Puerto Rico House," reportedly located on Third Avenue in the Bronx, New York. She stated that she attended two counseling sessions but did not continue. This information could not be verified as no listing could be found for this facility. Fernandez stated that she has received no psychological/psychiatric counseling prior to or since. It is noted that we were advised by defense counsel that Fernandez had an "emotional outburst" following her conviction after trial and had to be restrained by four U.S. Marshals and brought back to the holding cells. During an interview, the defendant's sister, Altagracia Fernandez, stated that the defendant some-

times suffers from depression and "nerves," explaining that Fernandez "takes things much too hard," and overreacts in stressful or difficult situations. During the presentence interview, the defendant was emotional, cried often, and at times became argumentative with her attorney.

58. On August 28, 2002, the day after her arrival at the MCC following her arrest, Fernandez was placed on suicide watch after admitting to having past suicidal ideation, although no formal plan or intent. She was seen on suicide watch approximately five times thereafter. In September 2002, Fernandez saw a psychiatrist after stating that she wanted to kill herself and her unborn baby and began beating her abdomen. Subsequently, in February 2003, she took a blade from a razor and threatened to cut her wrist.

59. On March 7, 2003, following her conviction after trial, Fernandez was referred to Beekman New York Downtown Hospital, after making suicidal statements, again threatening to kill herself and her then unborn child. She was maintained on a suicide watch and monitor her physical condition was monitored since she was 32 weeks into her pregnancy. The MCC medical/psychiatric staff believed that Fernandez required "acute hospitalization in a psychiatric hospital. However, it was determined that "there was no psychiatric hospital in the community willing to accept Fernandez for acute psychiatric hospitalization." MCC medical/psychiatric records indicate that the defendant continued to be seen for psychological counseling/treatment, both on a staff-referral and self-referral basis through at least June 23, 2003.

Substance Abuse

60. The defendant stated that she has no history of alcohol abuse or drug use and no history of treatment for substance abuse. Fernandez stated that she consumes alcohol moderately and on social occasions. A urine sample could not be taken as the defendant is in remand.

Education and Vocational Skills

61. Our subject related that she completed the eighth grade at an unrecalled elementary school in the Dominican Republic. Fernandez reported no other educational or vocational training neither in the Dominican Republic or in the United states.

Employment

62. Fernandez reported that she has never held employment outside the home while residing in the United States. However, at the time of her arrest on August 27, 2002, she told DEA agents that she worked as a hair dresser at the Aleya Salon, located at 179th Street and Third Avenue, Bronx, New York. Additionally, prior to immigrating here, she reportedly worked at a beauty salon in the Dominican Republic.

Financial Condition: Ability to Pay

63. In an oral statement to the probation officer, Fernandez stated that she has no savings or other assets, and no liabilities.

PART D. SENTENCING OPTIONS

Custody

64. **Statutory Provisions:** Count 1: The mandatory minimum term of imprisonment is 10 years; the maximum term of imprisonment is life, pursuant to 21 USC 841(b)(1)(A), 846.

65. **Guideline Provisions:** Based on a total offense level of 36 and a Criminal History Category of I, the guideline range for imprisonment is 188 to 235 months.

Supervised Release

66. **Statutory Provisions:** A term of at least 5 years' supervised release is required if a sentence of imprisonment is imposed, pursuant to 21 USC 841(b)(1)(A), 846.

67. **Guideline Provisions:** The guideline range for a term of supervised release is five years, the minimum required by statute, pursuant to §501.2(b).

Probation

68. **Statutory Provisions:** The defendant is not eligible for probation because the instant offense is one for which probation has been expressly precluded by statute, pursuant to 18 USC 3561(a)(2) and 21 USC 841(b)(1)(A).

69. **Guideline Provisions:** The defendant is not eligible for probation because the instant offense is one for which probation has been expressly precluded by statute, pursuant to §5B1.1(b)(2).

ADDENDUM TO THE PRESENTENCE REPORT

The Presentence Investigation report was forwarded to defense counsel and counsel for the government on June 18, 2003. The following addendum, dated July 18, 2003, addresses any objections received.

OBJECTIONS

By the Government

As of this date, we have received no objections from the Government. Therefore, it is unknown whether objections will be raised at sentencing.

By the Defendant

As of this date, we have received no objections from the defense attorney. Therefore, it is unknown whether objections will be raised at sentencing.

Revision(s)

¶¶ 55 and 56 now include information obtained from a review of the defendant's MCC medical records.

¶¶ 58 and 59 now contain information regarding the defendant's mental and emotional health, obtained from MCC records.

Respectfully submitted,

Chris J. Stanton
Chief U.S. Probation Officer

By: /s/ CLAUDE JEAN-BAPTISTE
CLAUDE JEAN-BAPTISTE
Sr. U.S. Probation Officer
212-805-5187

CJB/cjb

Approved:

/s/ K. E. COAD [ILLEGIBLE] 7/18/03
KATHLEEN ERICKSON COAD Date
Supervising U.S. Probation Officer

SENTENCING RECOMMENDATION

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES V. MAYRA FERNANDEZ,
DOCKET NO. (R) 02-CR-1398(DLC)

TOTAL OFFENSE LEVEL: 36
CRIMINAL HISTORY CATEGORY: I

	Statutory Provisions	Guideline Provisions
CUSTODY:	10 years to life imprisonment	188 - 235 months
SUPERVISED RELEASE:	5 years	5 years
PROBATION:	Not Eligible	Not Eligible
FINE:	$4,000,000	$20,000-$4,000,000
RESTITUTION:	Not Applicable	Not Applicable
SPECIAL ASSESSMENT:	$100	$100

	Recommended Sentence
CUSTODY:	188 months
SUPERVISED RELEASE:	5 years
PROBATION:	Not Recommended
FINE:	Not Recommended
RESTITUTION:	Not Applicable
SPECIAL ASSESSMENT:	$100

Justification

Mayra Fernandez, age 21, is before the Court for sentencing after having been found guilty following jury trial of one count of Conspiracy to Possess and Distribute Heroin, in violation of 21 USC 841(B)(1)(A); a Class A felony.

By way of background, Fernandez was involved in a family-run heroin distribution organization, which included her father, Elias Nazario Fernandez, and used suppliers and smugglers for the heroin that it distributed. Fernandez and her father obtained their heroin from different sources in the Caribbean and South America. According to trial testimony, Fernandez was introduced by her father to Joaquin Hernandez, who purported to be able to smuggle heroin for the family business. Subsequently, at a second meeting, Fernandez placed a large amount of heroin on her dining room table for Hernandez to see. Fernandez had two other meetings with Joaquin Hernandez at her apartment, during which the

storing and buying of large quantities of heroin were discussed.

Within a week or two of Fernandez's last meeting with Joaquin Hernandez, her boyfriend was shot and murdered outside her apartment door. New York City Police Detectives investigating the shooting discovered heroin packaging and processing materials in a box just outside of the apartment (Fernandez denied all knowledge of the box or its contents). The police detectives found more of the same heroin-related materials inside Fernandez's living room and in her bedroom.

Approximately one month after the shooting outside Fernandez's apartment, DEA agents began to arrest members of the family heroin business, including the defendant's father. However, Fernandez was not arrested at the time, having fled to the Dominican Republic. She was ultimately arrested by DEA agents on August 27, 2002, at the home of her sister in Long Island. Fernandez has a prior state conviction (March 22, 2000) for disorderly conduct, resulting from an attempt to smuggle marijuana into prison for her former consensual spouse. She was also arrested in May 2002, in the Bronx, New York, after becoming involved in an altercation. However, it appears that the arrest has been sealed.

Fernandez is the offspring of a one-parent household, after her parents separated when she was approximately two years of age. She was then raised by her mother under poor economic conditions. She had the first of her three children at the age of thirteen, and attempted to hurt her then unborn third child by striking at her abdomen, while in custody for the instant offense. Fernandez left the Dominican Republic and joined her father in the United States in 1997. It appears that the defendant's father may have been involved in narcotics

trafficking at the time of Fernandez's arrival in the United States, and may be responsible for introducing her into this "business." During the time in which she was involved in narcotics trafficking, Fernandez boyfriend was murdered by William Henriquez, the father of her oldest child. At the presentence interview, Fernandez stated that she feared being harmed by Henriquez, since she implicated him in the murder. The defendant stated that Hernandez has threatened to do her harm after she is deported to the Dominican Republic, and has also threatened her mother who resides there, saying that her mother was forced to relocate in order to avoid Henriquez (MCC medical psychiatric records indicate that Fernandez expressed this fear several times during psychological counseling sessions, at one time suspecting that Henriquez may have been housed at the MCC also).

Fernandez faces a sentencing range of 188 to 235 months' imprisonment. As all the defendant's conduct has been taken into account in formulating our guidelines calculations, and there appear to be no mitigating or aggravating factors present, a sentence at the lower end of the sentencing range appears appropriate, and will address the sentencing objectives of punishment, general deterrence and incapacitation. It is evident from the defendant's documented medical/psychiatric records that she is in need of emotional/psychological health treatment. It is hoped that Fernandez will continue to avail herself of such treatment while serving her sentence. Mental health treatment should be a condition of supervision following her release to the community.

Pursuant to the Violent Crime Control and Law Enforcement Act of 1994, for offenses committed after September 13, 1994, the court shall require that

all offenders on probation, parole, or supervised release submit to one drug test within fifteen days of commencement of probation, parole or. supervised release and at least two drug tests thereafter for use of a controlled substance, unless ameliorated or suspended by the court due to its determination that the defendant poses a low risk of future substance abuse as provided in 18 USC 3563(a) (5)/3583(d).

Drug Risk Analysis

Although the defendant denies any history of drug use, because of the drug-related nature of the offense, the mandatory drug testing condition should be imposed as a precautionary measure.

Recommendation

We respectfully recommend that Your Honor impose a sentence of 188 months' imprisonment to be followed by 5 years' supervised release.

Mandatory Conditions

If a period of probation/supervised release is ordered, the following conditions are mandatory:

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall not possess a firearm or destructive device.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug testing within fifteen (15) days of

placement on probation or supervised release and at least two unscheduled drug tests thereafter, as directed by the probation officer.

Standard and Special Conditions

The standard conditions of supervision (1-13) are recommended with the following special conditions:

1) The defendant shall participate in a mental health program approved by the U.S. Probation Office. The defendant shall continue to take any prescribed medications unless otherwise instructed by the health care provider. The defendant shall contribute to the costs of services rendered not covered by third-party payment, if the defendant has the ability to pay. The Court authorizes the release of available psychological and psychiatric evaluations and reports to the health care provider.

2) The defendant shall comply with the directives of the Bureau of Citizenship and Immigration Services.

The defendant is to report to the nearest Probation Office within 72 hours of release from custody.

If the defendant is sentenced to any period of supervision, it is recommended that the defendant be supervised by the district of residence.

Special Assessment

It is further ordered that the defendant shall pay to the United States a special assessment of $100, which shall be due immediately.

Fines

We believe that the defendant does not have the ability to pay a fine and recommend that the fine in this case be waived.

Voluntary Surrender

The defendant has been detained without bail since her arrest. She is not a candidate for voluntary surrender because of the provisions found in 18 USC § 3143(a)(2).

Respectfully submitted,

Chris J. Stanton
Chief U.S. Probation Officer

By: /s/ CLAUDE JEAN-BAPTISTE
CLAUDE JEAN-BAPTISTE
Sr. U.S. Probation Officer

CJB/cjb
Approved:

July 18, 2003
Date

/s/ KATHLEEN ERICKSON COAD (By CJB)
KATHLEEN ERICKSON COAD
Supervising U.S. Probation Officer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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02 Cr. 881 (HB)
January 26, 2004

UNITED STATES OF AMERICA,

—v.—

ELLIAS NAZARIO FERNANDEZ,
Defendant.

Before:

HON. HAROLD BAER, JR.,
District Judge

APPEARANCES

DAVID N. KELLEY
United States Attorney for the
Southern District of New York

BY: ROBIN LINSENMAYER
Assistant United States Attorney

ELLYN I. BANK
Attorney for Defendant

(Case called)

THE COURT: I'm glad you could make it, Ms. Bank.

MS. BANK: We had terrible delays at 42 Street. I apologize.

THE COURT: We agreed that the last time you were here that you would try to check the safety valve route and I gather that it worked and it didn't work. But if you have any more you would like to say on your client's behalf, this is the opportunity.

MS. BANK: Well, your Honor, that's the correct characterization of what happened at the safety valve proffer.

Mr. Fernandez did come forward, although late, he did come forward and was completely honest about his drug dealing and he understands that although he did receive the two guideline level reductions for the safety valve he, the quantity now has been increased by two levels. However, the safety valve does do away with the mandatory minimum.

Your Honor, Mr. Fernandez is not a young man, he's made a lot of mistakes in his life. He has also had a lot of health problems suffering from syphilis when he was admitted into the jail.

I know he is remorseful and sorry. I know he does want to make a statement to your Honor and the only other matter that I would speak to is the fact that in fact although the records have Mr. Fernandez' age at 54 or 55, he is actually 62 and the reason for that—and there is no evidence of that, but the reason for that is when he was 7 years old he was adopted by his aunt and uncle and in the Dominican Republic and they just started him from scratch at that time. And if you take a look at the defendant, I think that he certainly looks a lot older than a man of 54 or 55 years old.

So, although I don't have any concrete evidence of that, the defendant has told me that and I ask you to be as lenient as possible, and even a one-level departure, if your Honor sees fit within your discretion, would be helpful to Mr. Fernandez, particularly at his age.

THE COURT; Well, that's a nice thought but you think there is some authority to support it?

MS. BANK: No, your Honor.

THE COURT: That's a problem we have, I think.

MS. BANK: And your Honor, I had a lot of discussions with Mr. Fernandez and I have explained that we have basically done everything that we can possibly do under the law and basically we are just asking for leniency from your Honor and I know he would like to make a statement.

THE COURT: Very well. Why don't we hear from the government if they have anything to say first and then from your client.

MS. LINSENMAYER: Your Honor, beyond what's in the government's submissions of December 22nd and January 20th we have nothing to add, unless your Honor—

THE COURT: I have January 20th. If you have a January 22nd you ought to give it to me.

MS. LINSENMAYER: December 22nd, which is our initial submission.

THE COURT: If there is something you would like to say, Mr. Fernandez, this is the opportunity to do so.

THE DEFENDANT: Your Honor, I apologize for what I have done and I plead guilty for what I have done and know that things that I did because of financial need because my son and my mother died and that's why I got

involved in this. And I'm sorry and I ask you for leniency because my family is going through a hard time. That's all.

THE COURT: Well, as you understand, Mr. Fernandez, Congress, in its wisdom, has provided what we call a sentencing guidelines which I'm sure Ms. Bank explained to you in some detail, and so without falling within one of the specific areas for which departures, that is downward departures in your case are applicable, I really don't have any room to move around.

So, while I sympathize and indeed the thought was, I suppose, that even though you might implicate your daughter that the government was well aware of all of that before you did so and that they would not turn around and use your proffer against you, but it's been a long time since I played the chief of criminal division, it may be a very different United States attorney's office, to say nothing of Congress.

So, I really don't have very much choice and I sort of took an oath, as you may understand, to uphold the law, so I am going to indeed, in concert with that only, sentence you in accordance with the guidelines. And I understand that both 3553(f) and U.S.S.G. Section 2D1.1(B)(6) have been utilized in the best way they could, or at least in an appropriate way.

So, I am going to sentence you to the custody of the attorney general for the minimum sentence in the range you have fallen of 135 months, followed by two years of supervised release. There is no reason or appropriateness for a fine or restitution and therefore none is imposed. The drug testing, in accordance with the law, will in fact occur following your release. There is a $100 assessment.

I think there is only one count, is that right?

MS. LINSENMAYER: There are two counts.

THE COURT: Two counts, a $200 special assessment which is due forthwith. And you will report to the nearest probation office to your residence following your release from custody.

Is there anything further from either the government or the defense?

MS. LINSENMAYER: Yes. Your Honor. I believe that for the offenses of conviction the minimum supervised release term is five years.

THE COURT: Yes; well, I imposed two.

MS. LINSENMAYER: Okay.

THE COURT: You can go to the Court of Appeals on that issue. There is, however—especially at his age—there was something else that I have now forgotten.

Oh yes, you are entitled to appeal. Ms. Bank will undoubtedly file you a notice if you ask her to do so.

Anything further?

MS. LINSENMAYER: Yes. I would ask respectfully that the underlying indictment, 02 crim 881 against the defendant, be dismissed at this time.

THE COURT: I, assume that that will be joined in by the defense and granted.

MS. LINSENMAYER: And one more thing. I would ask that the Court specifically advise the defendant that one of the conditions of supervised release is cooperation with immigration authorities.

THE COURT: Very well.

You will indeed cooperate with the immigration authorities following your release and provide to them

any records or documents or communications of other sorts that they require.

Anything from the defendant?

MS. BANK: No, your Honor.

05-1596-cr

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

MAYRA FERNANDEZ, also known as Frank Morena, also known as La Jefa,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

LANCE CROFFOOT-SUEDE
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION PURSUANT TO F.R.A.P. RULE 28 1

A. Basis for the District Court's Jurisdiction 1

B. Basis for the Court of Appeals' Jurisdiction 1

C. Timeliness of Appeal 1

D. Appeal from Final Judgment 2

STATEMENT OF ISSUES PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 2

A. Nature of the Case, Course of Proceedings, and District Court Disposition 2

STATEMENT OF FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW 4

A. The Interrelationship Between the Convictions of Mayra and Elias Fernandez 4

B. Disparity in Sentences Imposed Upon Mayra and Elias Fernandez 5

C. The Defense Argument at Sentencing Regarding Disparity and the District Court Analysis..... 6

D. Ms. Fernandez's Assistance to the Government 7

E. The Defense Argument at Sentencing Regarding Ms. Fernandez's Cooperation and the District Court Analysis..... 9

SUMMARY OF THE ARGUMENT 10

ARGUMENT..... 11

I. The Sentence Imposed Upon Ms. Fernandez Is Unreasonable Pursuant to *Crosby* Because the District Court Committed a Statutory Error in Violation of 18 U.S.C. § 3553(a) by Failing to Afford Proper Consideration to Each of the Factors Listed in 18 U.S.C. § 3553(a) 11

A. Standard of Review..... 11

B. Disparity is a Factor That Must Be Considered Separate and Apart From a Guidelines Analysis 13

C. At Sentencing, the District Court Failed to Consider Ms. Fernandez's Partial Assistance to the Government Under 18 U.S.C. § 3553(a)(1) 17

II. The Sentence Imposed Upon Ms. Fernandez Was Unreasonable in Length, Due in Part to the District Court's Failure to Consider Properly Her Cooperation with the Government and the Disparity Between the Sentences Imposed Upon Ms. Fernandez and Her Father ... 22

A. Standard of Review and Analysis of this Court's Authority to Review The Reasonableness of the Sentence Imposed Upon Ms. Fernandez 22

B. The Sentence Imposed Upon Ms. Fernandez Was Unreasonably Long, Due In Part to the Fact that the District Court Failed to Consider the Lesser Sentence of Elias Fernandez, and Failed to Appreciate Its Ability to Consider Ms. Fernandez's Cooperation as Part of the Non-Guidelines Sentence 24

CONCLUSION..... 27

TABLE OF AUTHORITIES

FEDERAL CASES

Anderson v. *City of Bessemer*, 470 U.S. 564 (1985) 12-13

Simon v. *United States*, 361 F. Supp. 2d 35 (E.D.N.Y. 2005) 14, 17

United States v. *Anderson*, 15 F.3d 278 (2d Cir.1994) 21

United States v. *Belk*, 346 F.3d 305 (2d Cir. 2003) 14

United States v. *Bonner*, 313 F.3d 110 (2d Cir. 2002) 25

United States v. *Booker*, 125 S. Ct. 738 (2005) 11, 12, 16, 23, 25

United States v. *Caperna*, 251 F.3d 827 (9th Cir. 2000) 26

United States v. *Chalarca*, 95 F.3d 239 (2d Cir. 1996) 13

United States v. *Crosby*, 397 F.3d 103 (2d Cir. 2005) ..... passim

United States v. *Ekhator*, 17 F.3d 53 (2d Cir. 1994) 21

United States v. *Ekwunoh*, 12 F.3d 368 (2d Cir. 1993) 12

United States v. *El-Gheur*, 201 F.3d 90 (2d Cir. 2000) 20

United States v. *Fleming*, 397 F.3d 95
(2d Cir. 2005).....16, 21

United States v. *Hubbard*, 369 F. Supp. 2d 146
(D. Mass. 2005).....17-18

United States v. *Joyner*, 924 F.2d 454
(2d Cir. 1991).....15, 25

United States v. *Leung*, 360 F.3d 62
(2d Cir. 2004) 14

United States v. *Olano*, 507 U.S. 725 (1993).... 13

United States v. *Pelensky*, 129 F.3d 63
(2d Cir.1997)..... 21

United States v. *Rivers*, 50 F.3d 1126
(2d Cir. 1995).....17, 22

United States v. *Rogers*, 129 F.3d 76
(2d Cir. 1997) 14

United States v. *Rubenstein*, 403 F.3d 93
(2d Cir. 2005).....12, 24

United States v. *Sweeney*, 90 F.3d 55
(2d Cir.1996)..... 21

United States v. *Webb*, 403 F.3d 373
(6th Cir. 2005) 23

STATUTES

18 U.S.C. § 3551..... 25

18 U.S.C. § 3553(a).....passim

U.S.S.G. § 5K1.1 20

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION PURSUANT TO F.R.A.P. RULE 28

A. *Basis for the District Court's Jurisdiction*

On March 7, 2003, following a jury trial, the defendant-appellant, Mayra Fernandez, was convicted of one count of conspiracy to distribute and possession with intent to distribute heroin, in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A). The District Court had jurisdiction over the case pursuant to 18 U.S.C. § 3231, which grants original jurisdiction to the district courts of all offenses committed against the United States.[1]

B. *Basis for the Court of Appeals' Jurisdiction*

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, in that the defendant appeals from a final judgment of conviction and sentence entered on March 18, 2005.[2]

C. *Timeliness of Appeal*

The final judgment of conviction and sentence was entered on March 18, 2005 and, pursuant to Rule 4(b)(1)(A) of the Federal Rules of Appellate Procedure ("F.R.A.P."), the defendant filed a timely Notice of Appeal on March 22, 2005.[3]

---

[1] The District Court docket entries are included herein at Appendix A-1.

[2] A copy of the judgment is included herein at Appendix A-39.

[3] A copy of the date-stamped Notice of Appeal is included herein at Appendix A-48.

D. *Appeal from Final Judgment*

This appeal is from the March 17, 2005 sentencing of Ms. Fernandez in the Southern District of New York before the Hon. Denise L. Cote, and is therefore an appeal from a final judgment that disposed of all claims involving the defendant before the District Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court impose an unreasonable sentence upon Ms. Fernandez by failing to consider properly the factors enumerated in 18 U.S.C. § 3553(a)?

2. Did the trial court impose an unreasonably long sentence upon Ms. Fernandez, due to its failure to consider properly the factors enumerated in 18 U.S.C. §3553(a)?

STATEMENT OF THE CASE

A. *Nature of the Case, Course of Proceedings, and District Court Disposition*

On June 9, 2002, a criminal complaint was filed against Mayra Fernandez, charging her with violations of 21 U.S.C. §§ 812, 841(a), and 841(b)(1)(A); shortly thereafter, she was arrested and imprisoned. On October 29, 2002, a grand jury returned a one-count indictment against Ms. Fernandez (the "Indictment"), alleging that from at least in or about August 1999, up to and including at least in or about May 2002, she conspired with others to distribute and possessed with the intent to distribute one kilogram and more of mixtures and substances containing a detectable amount of heroin, in violation of 21 U.S.C. §§ 812, 841(a), and 841(b)(1)(A).

The "Overt Acts" section of the Indictment alleged one overt act occurring in or about August 1999, and a second overt act occurring in or about May 2002. *See* Sentencing Memorandum on Behalf of Mayra Fernandez (referred to hereinafter in its redacted form as the "Sentencing Memorandum" and in its unredacted form as described in footnote 5 *infra* as the "Unredacted Sentencing Memorandum").

At the request of the government in a letter dated March 1, 2003, a redacted indictment was filed against Ms. Fernandez (the "Redacted Indictment"). The Redacted Indictment alleged the same solitary count as the Indictment, but narrowed the time frame of the alleged conspiracy to cover the period from in or about Fall 2001 up to and including in or about May 2002, and also struck the reference to the overt act allegedly occurring in or about August 1999. Ms. Fernandez proceeded to trial on the charge in the Redacted Indictment; the trial of this matter began on March 3, 2003. Despite the government's request to file the Redacted Indictment, which excluded reference to an alleged overt act occurring in or about August 1999, the government sought to introduce evidence of this alleged overt act at trial; the District Court excluded the evidence. Ms. Fernandez was convicted of the crime alleged in the Redacted Indictment on March 7, 2003.

The Probation Department submitted a Presentence Investigation Report ("the PSR") to the District Court on July 18, 2003.[4] On October 14, 2003, the undersigned counsel was appointed as CJA counsel to represent Ms. Fernandez. Thereafter, Ms. Fernandez was sentenced by the Hon. Denise L. Cote on March 17, 2005, to a term of imprisonment of 151 months to be followed by a term of

[4] The PSR has been filed under seal with the Court of Appeals.

supervised release of five years, and was ordered to pay a special assessment of $100. Ms. Fernandez is currently serving her sentence at the Westchester County Correctional Facility in Valhalla, New York.

STATEMENT OF FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

A. *The Interrelationship Between the Convictions of Mayra and Elias Fernandez*

Mayra Fernandez is a 22-year old mother of three children with no criminal history prior to the offense that is the subject of this appeal. Her conviction for the instant offense is a direct result of the influence of several male figures in her life–including primarily the influence of her father, Elias Fernandez.

When Mayra was a young child, Elias Fernandez deserted the family in the Dominican Republic and came to the United States. Elias Fernandez eventually made it to New York, where he started his own narcotics distribution business. His illegal business was a "success" and he had several associates that joined his network. When Mayra came to New York as an uneducated mother of a young child, she was reunited with her father and eventually became subsumed in his heroin culture. The Probation Department acknowledges Elias Fernandez's prominent role in introducing Mayra to the drug distribution business. *See* PSR at 4, 15-16.

Due in part to Mayra's longing for her father's love and acceptance and her need to provide for her children, Elias was able to convince Mayra to join his enterprise. As such, Elias Fernandez taught Mayra how to sell and package drugs and offered to help her pay for an apartment, with the understanding that she would assist him

in his narcotics operation, and allow him to store his drugs at her home. *See* PSR at 4-5. Mayra's association with her father directly led to her arrest and conviction, as the only trial testimony about drug weight came from an undercover agent named Joaquin Hernandez, who had several dealings with Elias Fernandez over a course of time, and whom Elias eventually introduced to Ms. Fernandez. *See id.* at 4.

B. *Disparity in Sentences Imposed Upon Mayra and Elias Fernandez*

Elias Fernandez's narcotics distribution business was eventually infiltrated and the members of the distribution ring, including Elias and Mayra Fernandez, were eventually arrested and convicted. Elias Fernandez pled guilty to a superseding information charging him with conspiring, over a four and one-half year period from early 1998 up to and including June 2002, to distribute five kilograms and more of cocaine and one kilogram and more of heroin. *See* Exhibit Z to Sentencing Memorandum. Mayra Fernandez was convicted of conspiring over a nine-month period (during the aforementioned four and one-half year period) to distribute and possessing with the intent to distribute one kilogram and more of heroin. *See* Exhibits A and B to the Sentencing Memorandum.

Despite the fact that Elias Fernandez was convicted of a conspiracy lasting over four times longer than the conspiracy for which Mayra was convicted, and involving five times the amount of illegal narcotics, Elias Fernandez was sentenced to a term of 135 months, while Mayra Fernandez was sentenced to a term of 151 months. *See* Exhibit I to the Sentencing Memorandum.

C. *The Defense Argument at Sentencing Regarding Disparity and the District Court Analysis*

The sentencing memorandum submitted on behalf of Ms. Fernandez discussed this sentencing disparity at length, and argued that it was a necessary consideration at sentencing pursuant to 18 U.S.C. § 3553(a)(6), in order to "avoid unwarranted sentence disparities among defendants with similar records." *See* Sentencing Memorandum at 42-45. At the sentencing hearing, the District Court did not solicit any additional submissions from the defense regarding this issue; nonetheless, defense counsel referenced the entirety of the sentencing submissions during argument. *See* Appendix A-31. Other than providing a summary statement that it recognized its duty to "consider all the factors under 3553(a)", the District Court provided no analysis of the disparity in sentencing that would result if Mayra Fernandez were sentenced to a term of 151 months. *See* Appendix A-36.

D. *Ms. Fernandez's Assistance to the Government*

The defense argued at sentencing that the District Court should take into account the fact that Ms. Fernandez had assisted the government in its apprehension and prosecution of at least one suspect implicated in a murder investigation.[5]

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[5] Due to the sensitive nature of Ms. Fernandez's cooperation efforts with the government, defense counsel obtained permission from the District Court to file certain portions of its sentencing memorandum and reply memorandum under seal. *See* February 9, 2005 letter to the Hon. Denise L. Cote, attached as Exhibit D to the Sentencing Memorandum. In advance of sentencing, unredacted versions of both the sentencing memorandum (referred to herein as the "Unredacted Sentencing Memorandum") and the reply memorandum (referred to herein as the "Unredacted Reply Memorandum") were served on Judge Cote's chambers and the government. The govern-

After being initially approached by the government and asked to make herself available on a time-sensitive basis, Ms. Fernandez agreed to meet with the government to discuss various criminal investigations; she eventually proffered on six separate occasions. At first, Ms. Fernandez felt uncomfortable in speaking with the government because the subjects she discussed imperiled both herself and her family members.[6] Ms. Fernandez's initial reluctance to meet with the government was assuaged when the government raised the possibility of placing her relatives into the federal witness protection program, and thereafter contacted certain of her relatives.

As a direct result of Ms. Fernandez's cooperation efforts, the government filed a complaint against a suspected violent criminal, and was able to prevent the suspect's deportation. *See* Exhibit II to the Unredacted Sentencing Memorandum; *see also* Opposition at 16. The information that Ms. Fernandez provided to the government is clearly stated in the complaint and thereby compromises Ms. Fernandez's identity to anyone familiar with the crime. *See* Exhibit II to the Unredacted Sen-

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ment submitted the entirety of its opposition papers under seal (referred to herein as the "Opposition"). In order to continue to protect this information while at the same time making these materials available to this Court for purposes of this appeal, defense counsel and the government entered into a stipulation ordered by the District Court on May 23, 2005, pursuant to which copies of the Unredacted Sentencing Memorandum, the Unredacted Reply Memorandum, and the Opposition will be made available to this Court within 24 hours of its request to defense counsel and/or the government. The stipulation is included herein at Appendix A-49.

[6] Ms. Fernandez informed the District Court of these fears at a February 21, 2003 hearing. *See* Exhibit FF to the Unredacted Sentencing Memorandum at 18, lines 19-25.

tencing Memorandum at ¶6. Despite Ms. Fernandez's extensive assistance to the government and her willingness to meet with them at their initial request and on five subsequent occasions, the government terminated their proffer sessions with Ms. Fernandez without offering her a cooperation agreement. *See* Exhibit JJ to the Unredacted Sentencing Memorandum. Ms. Fernandez's relatives were never placed in the witness protection program, and no other tangible benefits have been accorded to Ms. Fernandez for her cooperation.

E. *The Defense Argument at Sentencing Regarding Ms. Fernandez's Cooperation and the District Court Analysis*

Defense counsel argued in the Unredacted Sentencing Memorandum that the District Court should grant a United States Sentencing Guidelines (hereinafter, the "U.S.S.G." or the "Guidelines") § 5K2.0 departure based upon, *inter alia* Ms. Fernandez's efforts at cooperation. *See* Unredacted Sentencing Memorandum at 25-26, 35-38. In the alternative, defense counsel urged the District Court that Ms. Fernandez's cooperation efforts should be considered as part of its analysis of her personal history and characteristics, as provided in 18 U.S.C. § 3553(a)(1), and in the District Court's calculation of the proper Guidelines range for an offender's conduct as set forth in 18 U.S.C. § 3553(a)(4). *See id.*; *see also* Appendix A-30 – A-31.

At no time did the defense request a downward departure pursuant to U.S.S.G. § 5K1.1 and defense counsel made this point explicit at the sentencing hearing. *See* Unredacted Sentencing Memorandum at 25 n.21; *see also* Appendix A-30. Nevertheless, in the Opposition, the government argued at length that Ms. Fernandez did not fulfill the typical requirements of a cooperator and

for that reason should be given no credit whatsoever for her efforts, even under the rubric of 18 U.S.C. § 3553(a)(1). *See* Opposition at 16-21. Similarly, at sentencing, the District Court seemed to take the view that Ms. Fernandez's efforts fell far short of the *ne plus ultra* of cooperation that the District Court expected. *See* Appendix A-34 to A-36. Other than to state that it was "aware . . . that I have the duty to . . . consider all the factors under 3553(a)," the District Court at no time indicated that it considered Ms. Fernandez's cooperation as part of that analysis. *See* Appendix A-36.

SUMMARY OF THE ARGUMENT

1. The District Court imposed an unreasonable sentence upon Ms. Fernandez due to its failure to follow the proper procedure for imposing sentence. As set forth in *United States* v. *Booker* and *United States* v. *Crosby*, the sentencing court has an affirmative obligation to consider all of the relevant sentencing factors under 18 U.S.C. § 3553(a). The defense argued in its sentencing submissions that disparity would result if Mayra Fernandez were to be sentenced to a term of imprisonment in excess of the sentence imposed upon her father. Despite the defense's argument and in direct contravention of its sentencing duties pursuant to *Booker* and *Crosby*, the District Court failed to consider 18 U.S.C § 3553(a)(6) at sentencing. Furthermore, the District Court failed to consider Ms. Fernandez's efforts to cooperate with the government as part of her personal history and characteristics under 18 U.S.C. § 3553(a)(1). Although the District Court expressed the opinion that Ms. Fernandez's efforts to cooperate were insufficient to grant a downward departure pursuant to U.S.S.G. § 5K1.1, at no time did the Court consider the same

efforts under 18 U.S.C. § 3553(a)(1). Therefore, pursuant to this Court's decision in *Crosby*, the District Court imposed an unreasonable sentence that must be vacated.

2. The District Court imposed a sentence upon Ms. Fernandez that was unreasonable in length in light of the brevity of the sentence imposed upon her father Elias Fernandez, and the District Court's failure to consider properly Ms. Fernandez's efforts to cooperate with the government as a relevant factor under 18 U.S.C. § 3553(a)(1). A reasoned consideration of these factors would have lead the District Court to impose a sentence of less than 151 months, and therefore the sentence must be vacated.

ARGUMENT

I. The Sentence Imposed Upon Ms. Fernandez Is Unreasonable Pursuant to *Crosby* Because the District Court Committed a Statutory Error in Violation of 18 U.S.C. § 3553(a) by Failing to Afford Proper Consideration to Each of the Factors Listed in 18 U.S.C. § 3553(a)

A. *Standard of Review*

The standard of review on appeal of a sentence imposed pursuant to *Booker* is determined by the basis for appeal. In general, all "appellate courts [must] determine whether the sentence is unreasonable with regard to § 3553(a)." *United States* v. *Booker*, 125 S. Ct. 738, 765-66 (2005) (internal quotations omitted). The factors set forth in Section 3553(a) serve as a guide "in determining whether a sentence is unreasonable." *Id.* As this Court noted in *Crosby*, that standard of review follows

"a similar approach when reviewing a decision for abuse of discretion." *United States* v. *Crosby*, 397 F.3d 103, 114 (2d Cir. 2005). A district judge abuses her discretion if, *inter alia*:

> (i) the decision "exceeded the bounds of allowable discretion";
>
> (ii) "the judge committed an error of law in the course of exercising [that] discretion";
>
> (iii) the judge "made a clearly erroneous finding of fact"; or
>
> (iv) "legal errors, properly to be considered on appeal, led to . . . imposition [of the sentence]."

Crosby, 397 F.3d at 114 (citations omitted).

The Supreme Court has held that the standard of review to apply to a sentencing decision of a district court is a review for unreasonableness, in light of the factors articulated in 18 U.S.C. § 3553(a). *See Booker*, 125 S. Ct. at 765-66. The District Court's interpretations of the Sentencing Guidelines—in reviewing its evaluation of the factors set forth in § 3553(a)(4)(A)—should be reviewed *de novo*. *See United States* v. *Rubenstein*, 403 F.3d 93, 99 (2d Cir. 2005). Findings of fact by the district judge should be reviewed for clear error.[7] *See id.* All of the errors that serve as the basis for this appeal were properly preserved before the District Court and

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[7] *United States* v. *Ekwunoh*, 12 F.3d 368, 370 (2d Cir. 1993) ("A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."); *see also Anderson* v. *City of Bessemer*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."), *quoted in United States* v. *Chalarca*, 95 F.3d 239, 244 (2d Cir. 1996).

were not harmless, thereby justifying vacatur and remand.[8] *See id.* at 114.

B. *Disparity is a Factor That Must Be Considered Separate and Apart From a Guidelines Analysis*

This Court has previously identified the failure of a district court to consider all of the factors listed in 18 U.S.C. § 3553(a)—rather than just the factors addressing Guidelines calculations—as an error that "would render a sentence unreasonable, regardless of length, because of the unlawfulness of the method of selection." *Crosby*, 397 F.3d at 115. On at least two occasions in *Crosby*, this Court explicitly stated that sentencing courts have the duty to consider *all* of the 18 U.S.C. § 3553(a) factors. *See id.* at 112, 113. The failure to do so results in the sentencing court committing a statutory error in violation of 18 U.S.C. § 3553(a) if the court failed to "consider" the appropriate guidelines range as well as the other 18 U.S.C. § 3553(a) factors. *See id.* at 115. *Crosby* demonstrates that the "other" factors in 18 U.S.C. § 3553(a) are no longer secondary to a Guidelines calculation, as they have gained "renewed significance" in light of *Booker*. *Crosby*, 397 F.3d at 111. Furthermore, district courts in this Circuit have adopted the view that all of the 18 U.S.C. § 3553(a) factors are entitled to equal weight. *See, e.g.*, *Simon* v. *United States*, 361 F. Supp. 2d 35, 40 (E.D.N.Y. 2005).

Perhaps one of the most compelling reasons *argued* to the district court in this case for not imposing a sentence

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[8] As such, a plain error review is inapplicable to these facts. A defendant is not required to demonstrate that the error was "plain" where the error was properly preserved. *See United States* v. *Olano*, 507 U.S. 725, 731-32 (1993), *cited in Crosby*, 397 F.3d at 114.

of 151 months was the sentencing disparity that would result if Ms. Fernandez was sentenced more severely than her father, Elias Fernandez, who was sentenced to a term of imprisonment of 135 months. As described *supra* in the Statement of Facts, Elias Fernandez operated a narcotics conspiracy long before Mayra Fernandez's arrival in this country, he introduced Mayra to his drug trade and groomed her for a life of crime, and was eventually convicted for conspiring to distribute far greater weights of narcotics than that for which his daughter was indicted. The District Court failed to consider the above-illustrated sentencing disparity in imposing sentence upon Ms. Fernandez. This argument has been extensively briefed before the District Court and is properly preserved for appellate review. *See* Sentencing Mem. at 42-45.[9]

This Court has held that a sentencing court fails to fulfill its statutory duty to consider the Guidelines "by a general reference to the entirety of the Guidelines Man-

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[9] *See United States* v. *Leung*, 360 F.3d 62 (2d Cir. 2004) (holding that the defendant adequately preserved his argument for a 3-level reduction in the offense level calculation where (i) the sentencing submission set forth the reasons for the reduction, (ii) the sentencing judge acknowledged reviewing the submission, and (iii) counsel reiterated the desire for a 3-level reduction at the sentencing hearing albeit without elaborating on all of the reasons for seeking such a reduction). *Compare United States* v. *Belk*, 346 F.3d 305 (2d Cir. 2003) (holding that the defendant did not raise the argument on appeal with the district court in *either* his sentencing submission *or* at the sentencing hearing, thus forfeiting his right to appeal on that basis absent a finding of plain error); *United States* v. *Rogers*, 129 F.3d 76, 80 (2d Cir. 1997) (holding that the defendant waived her claim for an adjustment for timely disclosure of complete information because the "record disclose[d] no instance, *either* in [the] presentence submission *or* at the sentencing hearing, in which she sought [such] an adjustment") (emphasis added).

ual, followed by a decision to impose a 'non-Guidelines sentence.' " *Crosby*, 397 F.3d at 111. Presumably, the converse is true—a sentencing court fails to "consider" the other factors listed in § 3553(a) by making a general reference to them and then choosing to impose a Guidelines sentence. Indeed, Judge Cote stated, "I'm fully aware that I have the power to depart and that I have the duty to determine what a reasonable sentence is and to consider all of the factors under 3553(a)." Appendix A-36 at lines 4-6. This brief allusion to the whole of the sentencing factors fails to satisfy the consideration contemplated by this Court in *Crosby*.

At sentencing, no mention was made of the need to avoid unwarranted sentencing disparities; nor was any reference made to 18 U.S.C. § 3553(a)(6). Instead, the Court stated that it "recognized" its duty to consider the 3553(a) factors, without providing any analysis whatsoever of sentencing disparity. A sentencing court's understanding of its ability to consider sentencing disparity in exercising its discretion was severely limited before *Booker* because a Guidelines sentence was mandatory, *Booker*, 125 S. Ct. at 750, and because precedent prohibited Guidelines departures based on sentencing disparity, *see United States* v. *Joyner*, 924 F.2d 454, 460-61 (2d Cir. 1991). All the record shows regarding the District Court's exercise of its discretion in light of 18 U.S.C. § 3553(a)(6) is a "general reference" to § 3553(a) and the existence of "non-Guidelines sentence[s]," followed by a decision to impose a Guidelines sentence. *Cf. Crosby*, 397 F.3d at 111. Indeed, even when the Guidelines were mandatory, sentencing judges were required to select an appropriate sentence within the prescribed range, based on its consideration of all the factors under § 3553(a). *Booker*, 125 S. Ct. at 750.

The instant case is quite different from the one in *United States* v. *Fleming*, where this court upheld a sentence imposed for a revocation of supervised release because the Guidelines and policy statements concerning such sentences were advisory even before *Booker*, and thus were a familiar sentencing scheme. *See United States* v. *Fleming*, 397 F.3d 95, 99-100 (2d Cir. 2005). This Court held it was acceptable to presume the requisite sentencing consideration occurred, in light of the fact that "*the record makes clear* that [the sentencing judge] was well aware of the 5-11 month range recommended in the Commission's policy statement and *explicitly* decided that a longer term was warranted." *Id.* (emphasis added). The sentencing transcript here is devoid of any references to sentencing disparity, nor does the record contain an explicit finding to sentence Ms. Fernandez to 151 months despite such disparity. Here, unlike the sentencing judge in *Fleming*, Judge Cote was faced with an unfamiliar sentencing scheme, approved by the Supreme Court a mere two months prior. Because nothing in the record indicates sentencing disparity was properly considered, separate and apart from the Guidelines, a proper consideration of this factor should not be presumed. *See, e.g., United States* v. *Rivers*, 50 F.3d 1126, 1132 (2d Cir. 1995). Without properly considering sentencing disparity and the potential imposition of a non-Guidelines sentence, Judge Cote indicated at the hearing that she wished to sentence at "the lowest end of the guidelines range."[10] *See* Appendix at A-34.

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[10] By indicating that she wished to sentence Ms. Fernandez to the low end of the applicable guidelines range, Judge Cote made clear that she was not "indicating that the sentence would be the same regardless of which Guidelines range applied . . . ." *Crosby*, 397 F.3d at 112.

In sum, under § 3553(a)(6), sentencing disparity is a factor separate and apart from the Guidelines, and nothing in the record indicates that sentencing disparity was properly considered, separate and apart from the Guidelines, and with full appreciation of its renewed significance. *Compare Simon*, 361 F. Supp. 2d at 40 ("[T]he Guidelines are advisory and entitled to the same weight accorded to each other factor that the Court is instructed to consider by § 3553(a).").

C. *At Sentencing, the District Court Failed to Consider Ms. Fernandez's Partial Assistance to the Government Under 18 U.S.C. § 3553(a)(1)*

In its written submissions to the District Court and again at sentencing, counsel for Ms. Fernandez urged the court to consider her cooperation with the government under the § 3553(a) factors. *See* Appendix A-39 to A-40 and Unredacted Sentencing Memorandum at 35-39. *See also United States* v. *Hubbard*, 369 F. Supp. 2d 146, 148 (D. Mass. 2005) ("The possibility that defendant's cooperation and assistance may not have been sufficient to justify a downward departure under the old mandatory system . . . does not foreclose the court from considering this factor under § 3553, and noting that in weighing statutory factors, certain portions of the record "may be more relevant than under the pre-Booker regime of mandatory guidelines" (citation omitted)). At sentencing, the government conceded that the District Court had the power to consider cooperation under the § 3553(a) factors; however, it expressed the view that "it's dangerous territory to give a credit for cooperation to people who have not fully cooperated, and it sends the wrong message to other prisoners and inmates about how the cooperation process could work." *See* Appendix A-33. Notwithstanding this argument, the government

acknowledged that Ms. Fernandez provided information to them, and that at least one individual had been apprehended as a result of the information she had provided. *See* Appendix at A-30.

At sentencing, the District Court briefly opined on cooperation:

> I guess I should also address the issue about cooperation. I think it's fair to say that it was fitful. Ms. Fernandez, facing a mandatory minimum term of imprisonment and guidelines range above that—I mean, the government was arguing for a guidelines range at level 36, I believe, and the PSR came in with a guidelines range at a level 36—decided it was in her interest to try to cooperate. But she did not do so in a way that suggests to me that it should be used to lighten her sentence.
>
> I mean, cooperation has many components to it. There is the obvious component of assisting the government in the prosecution of other wrongdoers, but I think that's really only the beginning. Of course there is a significant failure with respect to that component.
>
> But in terms of sentencing, I think cooperation is important because of what light it might shed on the character of a defendant, whether it shows the defendant has recognized the full implications of the choices they made in the past; whether they have decided to make a clean and full break with that and change their life in a significant way. On occasion cooperation really is a reflection of a dramatic change in the person's life. And that resonates in a way, in all ways that one must consider a sentence, including the likelihood of rehabilitation, the necessity for individual deterrence, the need for addi-

> tional punishment beyond that already imposed and suffered by a defendant.
>
> And so the fact that Ms. Fernandez was not able ultimately to follow through in a full and complete admission about her criminal activities, was not able to live in an appropriate way within the prison setting, difficult as I'm sure that is, again, undercuts using that brief exploration of what it was like being a cooperator as something that *should indicate in this case an alteration to a guideline sentence.*
>
> I'm fully aware that I have the power to depart and that I have the duty to depart and that I have the duty to determine what a reasonable sentence is and to consider all the factors under 3553(a) . . . .

Appendix A-43 to A-45 (emphasis added).

The above reasoning does not indicate that the District Court properly considered whether Ms. Fernandez's cooperation with the government was a reflection of her personal history and characteristics under 18 U.S.C. § 3553(a)(1). In fact, the District Court concluded its analysis of Ms. Fernandez's cooperation by stating that Ms. Fernandez's actions were insufficient to be used by the Court as an alteration "to a guidelines sentence." *See* Appendix at A-45. This statement demonstrates that the District Court misapprehended its authority to sentence Ms. Fernandez to a "non-guidelines sentence" that takes account of her cooperation under the rubric of 18 U.S.C. § 3553(a).

Furthermore, although the District Court's commentary sheds light on its belief that cooperation can be . transformative event, the standard articulated in this discourse seems to rise above even the requirements set

forth in U.S.S.G. § 5K1.1.[11] Application Note 2 to U.S.S.G. § 5K1.1 expressly states:

> The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. *Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant,* while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.[12] (emphasis added)

The District Court's explanation for refusing to consider Ms. Fernandez's cooperation with the government as proper grounds for a downward departure neglected to address the defense's argument that Ms. Fernandez's efforts should be taken into account under 18 U.S.C. § 3553(a)(1).

Consideration of Ms. Fernandez's incomplete cooperation as a factor in imposing a non-Guidelines sen-

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[11] Counsel for Ms. Fernandez did not challenge the government's refusal to move for a downward departure under U.S.S.G. § 5K1.1, or urge the court to *sua sponte* downwardly depart pursuant to U.S.S.G. § 5K1.1 absent the government's request. *See United States* v. *El-Gheur*, 201 F.3d 90, 94 (2d Cir. 2000) (refusing to recognize downward departures relating to substantial assistance under U.S.S.G. § 5K2.0 upon finding that the "very existence of § 5K1.1 demonstrates that the sentencing commission clearly considered the question of whether assistance to the government should be taken into account.").

[12] The District Court did not assess the policy factors listed under U.S.S.G. § 5K1.1, which include any injury suffered, or any danger or risk of injury to the defendant or her family resulting from her assistance or the significance and usefulness of Ms. Fernandez's assistance. *See, e.g.*, U.S.S.G. § 5K1.1 (Policy Statement) (a)(1) & (a)(4).

tence under 18 U.S.C. § 3553(a) was improbable prior to *Booker*.[13] *But cf. Fleming*, 397 F.3d at 101 (noting that the sentencing regime for revocation of supervised release had always permitted judges to exercise their discretion in choosing not to follow the Commission policy statements). This Court has recognized that, in circumstances such as the instant case in which the basis for a more lenient sentence was recently approved by the appellate court and the comments made by the sentencing judge are "[a]t the very best . . . ambiguous", remand for re-sentencing is appropriate. *See United States* v. *Ekhator*, 17 F.3d 53, 54-56 (2d Cir. 1994). Here, the District Court was faced with broader discretion under advisory guidelines, and it therefore may not have appreciated its discretion to consider Ms. Fernandez's cooperation with the government. *See Sweeney*, 90 F.3d at 58 (after reviewing the sentence for reasonableness, the sentence was vacated and remanded for re-sentencing where the record indicated that the sentencing court may not have understood its available sentencing options).

Due to the novelty of the non-mandatory Guidelines regime post-*Booker*, "[c]aution is warranted . . . where

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[13] Once an applicable Guidelines range has been determined, the sentencing judge will have the duty, imposed by subsection 3553(a)(4), to "consider" it, along with all of the factors listed in section 3553(a). *See* Section I(B), *supra*. As this Court held in *Crosby*: "We have previously encountered a sentencing judge's duty to "consider" matters relevant to sentencing. We have done so in applying section 3583(e), which requires a court deciding whether to revoke a term of supervised release and the length of any imprisonment for violation of supervised release, to consider[ ] many of the factors listed in section 3553(a), including those listed in subsection 3553(a)(4)." *Crosby*, 397 F.3d at 112-13. *See also United States* v. *Pelensky*, 129 F.3d 63, 69-70 (2d Cir.1997); *United States* v. *Sweeney*, 90 F.3d 55, 57-58 (2d Cir.1996); *United States* v. *Anderson*, 15 F.3d 278, 281–84 (2d Cir. 1994).

the . . . judge's sentencing remarks create ambiguity as to whether the judg[illegible]rrectly understood an available option." *Rivers*, 50 [illegible]d at 1132. The District Court's stated position on a defendant's cooperation efforts squarely fits into the category of cases where "a reviewing court should be cautious in making the assumption that the sentencing judge fully understood all options and, in the exercise of discretion, declined to accord the defendant some favorable consideration." *Rivers*, 50 F.3d at 1131.

For these reasons, the sentence should be vacated and remanded for re-sentencing.

II. The Sentence Imposed Upon Ms. Fernandez Was Unreasonable in Length, Due in Part to the District Court's Failure to Consider Properly Her Cooperation With the Government and the Disparity Between the Sentences Imposed Upon Ms. Fernandez and Her Father

A. *Standard of Review and Analysis of this Court's Authority to Review the Reasonableness of the Sentence Imposed Upon Ms. Fernandez*

At sentencing, the District Court made findings that Ms. Fernandez was in Criminal History Category I and that based upon trial testimony, the proper Guidelines offense level was 34. Thereafter, the District Court decided to impose a Guidelines sentence of 151 months, at the low end of level 34.[14] *See* Appendix at A-45. Although the District Court sentenced Ms. Fernandez within an arguably applicable guidelines range, such a

[14] The District Court did not "find a need to sentence the defendant at anything other than the lowest end of the guidelines range here." Appendix A-43.

sentence does not preclude this Court's review of the sentence for reasonableness.

The Supreme Court held in *Booker* that sentencing decisions must be reviewed for "reasonableness," and this applies to sentences both within and without the applicable guidelines range, because "despite the absence of § 3553(b)(1), the Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under § 3553(a))." *Booker*, 125 S. Ct. at 765. Even assuming *arguendo* that the District Court correctly calculated Ms. Fernandez's offense level and guidelines range, sentences imposed within a proper Guidelines range are not per-se reasonable. *See Crosby*, 397 F.3d at 115 (noting that reasonableness is "a concept of flexible meaning, generally lacking precise boundaries"); *see also United States* v. *Webb*, 403 F.3d 373, 385 n.8 (6th Cir. 2005) (citing *Crosby* for the proposition that a "per-se test is not only inconsistent with the meaning of 'reasonableness,' but is also inconsistent with the Supreme Court's decision in *Booker*, as such a standard 'would effectively re-institute mandatory adherence to the Guidelines'") (internal citation omitted). Indeed, the imposition of a Guidelines sentence does not preclude a finding that such a sentence is unreasonable, as the correct application of the U.S.S.G. is only one of the eight factors to be considered in reviewing the reasonableness of a sentence. *See Rubenstein*, 403 F.3d at 101-02 (Cardomone, J., concurring).

In light of this authority, it is proper for this Court to undertake a review of the length of the sentence imposed for reasonableness. As detailed *supra* in Section I, the District Court conducted a flawed analysis of whether to impose a non-Guidelines sentence pursuant to 18 U.S.C.

§ 3553(a) and therefore imposed a Guidelines sentence of unreasonable length, because the District Court failed to: (1) appreciate its ability to account for Ms. Fernandez's cooperation with the government under 18 U.S.C. § 3553(a)(1); and (2) consider the sentencing disparity between the sentence imposed by the District Court and that imposed upon Ms. Fernandez's father, Elias Fernandez.

B. *The Sentence Imposed Upon Ms. Fernandez Was Unreasonably Long, Due In Part to the Fact that the District Court Failed to Consider the Lesser Sentence of Elias Fernandez, and Failed to Appreciate Its Ability to Consider Ms. Fernandez's Cooperation as Part of a Non-Guidelines Sentence*

As demonstrated *supra* in Section I of the Argument, the District Court failed to consider, pursuant to 18 U.S.C. § 3553(a)(6), the disparity between the sentence imposed upon Mayra Fernandez and the sentence imposed upon Elias Fernandez, the human catalyst behind Mayra's illegal activities. In addition, the District Court did not consider Ms. Fernandez's cooperation with the government under 18 U.S.C. § 3553(a)(1). The District Court's failure to consider these points resulted in the imposition of an unreasonably long sentence of incarceration.

Consideration of the sentences of related defendants should be an aspect of reasonableness reviewed by this Court. One of the fundamental purposes of the Sentencing Reform Act was to avoid unwarranted disparity among similarly situated defendants. *See* 18 USC § 3551. *But see Joyner*, 924 F.2d at 460-61. Under *Booker*, the Supreme Court preserved the portion of the Act that addresses avoidance of unwarranted sentencing disparities. *Booker*, 125 S.Ct. at 767. Section 3553(a)(6) dic-

tates that the sentencing judge consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

The record does not indicate that the District Court appreciated its ability to consider the disparity between the sentences of Ms. Fernandez and her co-conspirators—particularly the disparity between the sentences imposed upon Mayra and her father, Elias Fernandez. Consideration of such disparity was an accepted practice long before *Booker*; and the policies espoused in *Booker* urge such consideration. *See United States* v. *Bonner*; 313 F.3d 110 (2d Cir. 2002) (holding that a sentencing court may consider co-defendant's sentences when considering the extent of a downward departure); *United States* v. *Caperna*, 251 F.3d 827 (9th Cir. 2000) (district court could only look to a co-defendant with the exact offense of conviction when considering to depart downward to correct a sentencing disparity). Had the District Court properly considered the sentencing disparity between Mayra Fernandez and her father, the sentence imposed upon Ms. Fernandez would have been more lenient.

As illustrated above in Section I(C), the District Court failed to consider properly 18 U.S.C. § 3553(a)(1), especially with regard to Ms. Fernandez's efforts at cooperating with the government. It is often the case that the defendants for whom the government makes a substantial assistance motion at sentencing receive a far more lenient sentence than would otherwise be the case. Such broad relief was not sought here. Instead, the defense admitted in its sentencing submissions that the most lenient sentence possible was 120 months, the statutory minimum for the offense of conviction. Nonetheless, the District Court focused its analysis of Ms. Fernandez's

cooperation on what her efforts lacked, when compared to a defendant for whom the government might make a substantial assistance motion.

By conducting its analysis in this manner, the District Court failed to appreciate these factors as part of Ms. Fernandez's personal history and characteristics pursuant to 18 U.S.C. § 3553(a)(1), and without the benefit of such consideration, imposed a sentence of unreasonable length.

For these reasons, the District Court sentence should be vacated and the case remanded to the District Court for further consideration of this factor under 18 U.S.C. § 3553(a).

CONCLUSION

For the reasons set forth herein, the District Court's sentence is unreasonable. Ms. Fernandez therefore asks that her sentence be vacated and this case be remanded to the District Court for re-sentencing.

Respectfully Submitted this 1st Day of July 2005,

/s/ LANCE CROFFOOT-SUEDE
Lance Croffoot-Suede, Esq. (LC-3725)
White & Case LLP
1155 Avenue of Americas
New York, New York 10036
(212) 819-8200

Attorneys for Defendant-Appellant Mayra Fernandez